TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 896

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, ET AL., APPELLANTS,

vs.

CITY OF ASBURY PARK, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED JANUARY 23, 1942.

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[fol. 1]

IN SUPREME COURT OF NEW JERSEY

Action at Law

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, Plaintiffs,

vs.

CITY OF ASBURY PARK, a Municipal Corporation, Defendant

NOTICE AND GROUNDS OF APPEAL—Filed April 15, 1941

To Defendant City of Asbury Park and Ward Kremer, Esq., Attorney for Defendant:

Please take notice that plaintiffs in the above entitled cause appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds, to wit:

1. The Court erroneously granted defendant's motion to strike the complaint on the ground that it did not set forth a legal cause of action.

2. The Court erroneously granted defendant's motion to strike the complaint on the ground that plaintiffs failed to aver in their complaint that they had obtained the permission of the New Jersey Supreme Court to institute the said suit.

3. The Court erroneously granted defendant's motion to strike the complaint on the ground that the plaintiffs had not obtained permission of the New Jersey Supreme [fol. 2] Court to institute the said suit.

4. The Court erroneously granted defendant's motion to strike the complaint in that the complaint stated a legal cause of action on its face.

5. The Court erroneously granted defendant's motion to strike the complaint in that there was no defect appearing upon the face of the complaint and the alleged bases in fact and law for said motion were introduced by proof *aliunde* and the facts and matters constituting said grounds

could only be taken advantage of by an answer and were not properly the subject of a motion to strike.

6. The Court erred in granting defendant's motion to strike the complaint in that the statute of the State of New Jersey (R. S. 52:27-38) purporting to require the obtaining of permission from the New Jersey Supreme Court to bring the said suit, and upon the basis of which the said motion was granted, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and in that it is a statute impairing the obligation of contracts and depriving a party of a remedy for enforcing a contract which existed when the contract was made in violation of Article IV, Section VII, Paragraph 3 of the Constitution of New Jersey and in that such statute deprives plaintiffs of their property without due process of law and denies plaintiffs the equal protection of the laws and abridges privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment [fol. 3] to the Constitution of the United States.

7. The Court erred in granting defendant's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937) set forth in defendant's motion papers providing for a compulsory composition of municipal bonds purporting to be binding on plaintiffs and to wipe out the obligations sued on in the complaint herein, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and in that it is a statute impairing the obligation of contracts and depriving a party of a remedy for enforcing a contract which existed when the contract was made in violation of Article IV, Section VII, Paragraph 3 of the Constitution of New Jersey and in that such statute deprives plaintiffs of their property without due process of law and denies plaintiffs the equal protection of the laws and abridges privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The Court erred in granting defendant's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937) set forth

in defendant's motion papers providing for a compulsory composition of municipal bonds purporting to be binding on plaintiffs and to wipe out the obligations sued on in the complaint herein was rendered nugatory and inoperative [fol. 4] and was superseded by the enactment by the Congress of the United States of an amendment to the Federal Bankruptcy Act entitled "Composition of Indebtedness of Local Taxing Agencies" approved by Act August 16, 1937, c. 657, 50 Stat. 654 as amended.

9. The Court erred in entering judgment for defendant upon its order granting defendant's motion to strike the complaint.

Respectfully yours, Arthur T. Vanderbilt, Attorney of Plaintiffs.

Sat Below:

Joseph L. Smith, C. C. J.

Service of a copy of the within Notice and Grounds of Appeal is hereby acknowledged this 12th day of April, 1941.
Ward Kremer, Attorney of Defendant.

[fol. 5] IN SUPREME COURT OF NEW JERSEY

SUMMONS—Filed December 14, 1940

The State of New Jersey to City of Asbury Park:

You are summoned to answer the annexed complaint of Faitoute Iron & Steel Company, a corporation organized under the laws of the State of New Jersey, and Moses W. Faitoute, in an action at law in the New Jersey Supreme Court, Essex County. And take notice that unless you file your answer to the said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and annexed complaint, the plaintiffs may proceed in this suit and judgment may be entered against you.

Witness, Thomas J. Brogan, Chief Justice of the Supreme Court, at Trenton, this ninth day of December, One Thousand Nine Hundred and Forty.

Fred L. Bloodgood, Clerk. (Seal.)

Arthur T. Vanderbilt, Attorney for Plaintiffs.

To the within named defendant:

Take notice that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you. Lawful service upon a corporation shall be deemed personal service.

Arthur T. Vanderbilt, Attorney of Plaintiffs.

[fol. 6] In Supreme Court of New Jersey, Essex County

Action at Law

Faitoute Iron & Steel Company, a Corporation, and Moses W. Faitoute, Plaintiffs,

vs.

City of Asbury Park, a Municipal Corporation, Defendant

Complaint—Filed December 14, 1940

Plaintiffs Faitoute Iron & Steel Company, a corporation of the State of New Jersey having its principal office and place of business in the City of Newark, Essex County, New Jersey, and Moses W. Faitoute, residing in the Township of Millburn, Essex County, New Jersey, say that:

First Count

1. Plaintiff Faitoute Iron & Steel Company is the owner and holder of fifty (50) Temporary Loan Bonds of the City of Asbury Park issued by defendant, dated April 1, 1930, and numbered 1 to 50, inclusive. Said bonds are each in the principal amount of One Thousand Dollars ($1,000.00), bore interest at the rate of five and three-quarters per cent (5¾%) per annum payable semi-annually, and were due and payable April 1, 1934.

[fol. 7] 2. None of said bonds have been paid and the sum of Fifty Thousand Dollars ($50,000.00) is due and owing thereon by defendant to plaintiff Faitoute Iron & Steel Company.

Plaintiff Faitoute Iron & Steel Company demands as damages on the First Count the sum of Fifty Thousand Dollars ($50,000.00) together with interest thereon at the rate of six per cent per annum from April 1, 1934 and costs of suit.

Second Count

1. Plaintiff Faitoute Iron & Steel Company is the owner and holder of twenty-five (25) Temporary Loan Bonds of the City of Asbury Park issued by defendant, dated June 1, 1929, and numbered 960 to 984, inclusive. Said bonds are each in the principal amount of One Thousand Dollars ($1,000.00), bore interest at the rate of six per cent (6%) per annum payable semi-annually, and were due and payable December 1, 1933.

2. None of said bonds have been paid and the sum of Twenty-five Thousand Dollars ($25,000.00) is due and owing thereon by defendant to plaintiff Faitoute Iron & Steel Company.

Plaintiff Faitoute Iron & Steel Company demands as damages on the Second Count the sum of Twenty-five Thousand Dollars ($25,000.00) together with interest thereon at the rate of six per cent per annum from December 1, 1933 and costs of suit.

Third Count

1. Plaintiff Faitoute Iron & Steel Company is the owner and holder of twenty-five (25) Temporary Loan Bonds of [fol. 8] the City of Asbury Park issued by defendant, dated June 1, 1929, and numbered 1901-1925, inclusive. Said bonds are each in the principal amount of One Thousand Dollars ($1,000.00), bore interest at the rate of six per cent per annum, payable semi-annually, and were due and payable December 1, 1934.

2. None of said bonds have been paid and the sum of Twenty-five Thousand Dollars ($25,000.00) is due and owing thereon by defendant to plaintiff Faitoute Iron & Steel Company.

3. Two interest coupons each in the amount of Thirty Dollars ($30.00), one of which was due on June 1, 1934 and the other of which was due on December 1, 1934, are

attached to each of said bonds. All of said coupons have been paid only to the extent of Seventeen Dollars and Sixty-seven Cents ($17.67) each. The balance of Twelve Dollars and Thirty-three Cents ($12.33) on each of said coupons is due and owing by defendant to plaintiff, Faitoute Iron & Steel Company. The whole sum due and owing on said coupons totals Six Hundred and Sixteen Dollars and Fifty Cents ($616.50) of which Three Hundred and Eight Dollars and Twenty-five Cents ($308.25) became due and owing on June 1, 1934 and Three Hundred and Eight Dollars and Twenty-five Cents ($308.25) on December 1, 1934.

Plaintiff, Faitoute Iron & Steel Company demands as damages on the Third Count the sum of Twenty-five Thousand Six Hundred and Sixteen Dollars and Fifty Cents ($25,616.50) together with interest at six per cent per an-
[fol. 9] num on Three Hundred and Eight Dollars and Twenty-five Cents ($308.25) of said sum from June 1, 1934 and on the balance of said sum from December 1, 1934, and costs of suit.

Fourth Count

1. Plaintiff, Moses W. Faitoute is the owner and holder of five (5) Registered Temporary Loan Bonds of the City of Asbury Park issued by defendant, dated June 1, 1929 and numbered 2135 to 2139 inclusive. Said bonds are each in the principal amount of One Thousand Dollars ($1,000.00), bore interest at the rate of six per cent per annum payable semi-annually, and were due and payable June 1, 1935.

2. None of said bonds have been paid and the sum of Five Thousand Dollars ($5,000.00) is due and owing thereon by defendant to plaintiff Moses W. Faitoute.

3. Interest was due and payable on each of said bonds in the amount of Thirty Dollars ($30.00) on each of the following dates: June 1, 1934, December 1, 1934 and June 1, 1935. None of said interest payments have been made except that Seventeen Dollars and Sixty-seven Cents ($17.67) was paid on account of each of the interest payments due on each of said bonds as aforesaid on June 1, 1934 and December 1, 1934. The balance of Twelve Dollars and Thirty-three Cents ($12.33) on each of the interest payments due on each of said bonds on June 1, 1934 and

December 1, 1934 and the whole of the interest payment of Thirty Dollars ($30.00) on each of said bonds due on June 1, 1935 is due and owing by defendant to plaintiff [fol. 10] Moses W. Faitoute. The whole sum due and owing for said interest totals Two Hundred and Seventy-three Dollars and Thirty Cents ($273.30), of which Sixty-one Dollars and Sixty-five Cents ($61.65) became due and owing on June 1, 1934, Sixty-one Dollars and Sixty-five Cents ($61.65) on December 1, 1934 and One Hundred and Fifty Dollars ($150.00) on June 1, 1935.

Plaintiff Moses W. Faitoute demands as damages on the Fourth Count the sum of Five Thousand Two Hundred and Seventy-three Dollars and Thirty Cents ($5,273.30), together with interest at six per cent per annum on Sixty-one Dollars and Sixty-five Cents ($61.65) of said sum from June 1, 1934, on Sixty-one Dollars and Sixty-five Cents ($61.65) of said sum from December 1, 1934, and on the balance of said sum from June 1, 1935, and costs of suit.

Arthur T. Vanderbilt, Attorney of Plaintiffs.

[fol. 11] In Supreme Court of New Jersey

[Title omitted]

Affidavit of Merits—Filed December 14, 1940

State of New Jersey,
County of Monmouth, ss:

Mary E. Vaccaro, of full age, being duly sworn according to law upon her oath, deposes and says:

I am the Acting City Clerk of the City of Asbury Park, a corporation organized and existing under the laws of the State of New Jersey, defendant in the above entitled cause.

The defendant, City of Asbury Park, has a legal defense to the said action, and a just and legal defense on the merits of the case.

Mary E. Vaccaro.

Subscribed and sworn to before me this 13th day of December, 1940. Helen Messler, Notary Public of New Jersey. (Seal.)

[fol. 12] In Supreme Court of New Jersey

[Title omitted]

Affidavit of Merits—Filed December 14, 1940

State of New Jersey,
County of Monmouth, ss:

Clarence E. F. Hetrick, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the Mayor of the City of Asbury Park, a corporation organized and existing under the laws of the State of New Jersey, defendant in the above entitled cause.

The defendant, City of Asbury Park, has a legal defense to the said action, and a just and legal defense on the merits of the case.

Clarence E. F. Hetrick.

Subscribed and sworn to before me this 13th day of December, 1940. Helen Messler, Notary Public of New Jersey. (Seal.)

[fol. 13] In Supreme Court of New Jersey

[Title omitted]

Affidavit of Merits—Filed December 14, 1940

State of New Jersey,
County of Monmouth, ss:

Milford G. Farley, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the City Manager of the City of Asbury Park, and am the agent of the City of Asbury Park, a corporation organized and existing under the laws of the State of New Jersey, defendant in the above entitled cause, and I believe that it has a just and legal defense to the said action on the merits of the case.

Milford G. Farley.

Subscribed and sworn to before me this 13th day of December, 1940. Helen Messler, Notary Public of New Jersey. (Seal.)

[fol. 14] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

NOTICE OF MOTION TO STRIKE COMPLAINT—Filed January 31, 1941

To Arthur T. Vanderbilt, Esquire, Attorney for Plaintiffs:

SIR:

Please take notice that on Saturday, the 11th day of January, 1941, I shall apply to the New Jersey Supreme Court at the Essex County Court House in the City of Newark, New Jersey, at ten-thirty o'clock in the forenoon or as soon thereafter as the matter can be attended to for an order striking the complaint in the above entitled cause for the following reasons:

1. The defendant, City of Asbury Park, has in operation a refunding plan and the claims of the plaintiffs are controlled by the terms and provisions of the said refunding plan.

2. The claim of the plaintiffs is controlled by the terms and provisions of N. J. S. A. 52:27-1 *et seq.* and N. J. S. A. 52:27-34 *et seq.*

[fol. 15] 3. The plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the above entitled cause of action.

Ward Kremer, Attorney for Defendant.

Dated—December 26, 1940.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF MILFORD G. FARLEY—Filed January 31, 1941

STATE OF NEW JERSEY,
County of Monmouth, ss:

Milford G. Farley, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the City Manager of the City of Asbury Park, a municipal corporation in the County of Monmouth. On

[fol. 16] or about March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission of the State of New Jersey, pursuant to the provisions of N. J. S. A. 52:27-1 *et seq.* The City was then in default on the payment of interest on its bonded indebtedness. On or about February 1, 1936, a plan for the refunding of the bonded indebtedness of the City of Asbury Park was filed in the New Jersey Supreme Court pursuant to the terms and provisions of N. J. S. A. 52:27-34 *et seq.*, and the New Jersey Supreme Court assumed jurisdiction over the proceedings for the refunding of the City's debt. The said refunding plan provided for the refunding of $10,750,000 of outstanding bonds of the City of Asbury Park, and included among the bonds to be refunded were all the bonds mentioned in the complaint in the above entitled cause. The said refunding plan as amended was approved by an order of the New Jersey Supreme Court July 21, 1937, and a true copy of the said refunding plan and the order approving the same are attached hereto and made a part hereof, and marked Schedule A. The said order approving the said refunding plan stated that the same was authorized and approved, provided creditors of the City of Asbury Park representing eighty-five per centum in amount of the indebtedness affected thereby should approve the said amended refunding plan in writing, in accordance with the terms and provisions of the statute in such case made and provided (N. J. S. A. 52:27-36).

On the 27th day of September, 1937, the Municipal Finance Commission of the State of New Jersey, by resolution, approved the said amended refunding plan, provided [fol. 17] the requisite number of creditors should consent thereto, in accordance with the statute in such case made and provided.

On the 29th day of April, 1938, creditors representing in excess of eighty-five per centum in amount of the indebtedness affected thereby having consented in writing to the said amended refunding plan, an order was entered in the New Jersey Supreme Court approving the said refunding plan and approving the adjustment or composition therein, in accordance with the statute in such case made and provided (N. J. S. A. 52:27-36), a true copy of which order is attached hereto and made a part hereof and marked Schedule B.

The said refunding plan was put into operation June 15, 1938, and the bondholders who had consented in writing

to the terms and provisions of the said refunding plan exchanged their outstanding bonds for new bonds issued to them in accordance with the terms and provisions of the said refunding plan.

Under the terms and provisions of the said amended refunding plan, the City of Asbury Park agreed to pay all interest on outstanding bonds at the contract rate up to and including December 31, 1933; and to pay all interest for the years 1934, 1935 and 1936, and for the first eleven months of 1937, or up until December 1, 1937, in cash, at the rate of three per cent per annum, and to issue to bondholders bonds bearing date the 1st day of December, 1937, and maturing in 1966, and bearing interest at the rate of four per cent per annum; and the said City of Asbury Park made available cash for the payment of the said delinquent interest above referred to, and paid the same to all bondholders exchanging their bonds under the terms and provisions of the said amended refunding plan.

[fol. 18] The said amended refunding plan has been in operation since June 15, 1938, and is still in operation, and all payments required to be made thereunder on bonds issued thereunder have been made, and the defendant has complied with all the requirements thereof and has complied with all its covenants with bondholders.

I am informed and verily believe that as a result of the order of April 29, 1938, and the placing in operation of the said refunding plan, the said adjustment so authorized and approved was forthwith binding upon all the creditors included in the plan whether or not they appeared in the proceeding, and that the bonds of the plaintiffs, being included in the said refunding plan, were controlled by the said plan (N. J. S. A. 52:27-37).

The said order further provided that the New Jersey Supreme Court should retain jurisdiction over the proceeding. The plaintiff has not obtained permission of the New Jersey Supreme Court to institute the present suit, and I am informed and verily believe that in accordance with the statute in such case made and provided, the plaintiffs have no legal cause of action against the City of Asbury Park (N. J. S. A. 52:27-38).

Milford G. Farley.

Subscribed and sworn to before me this 27th day of December, 1940. Mabel M. Haight, Notary Public of New Jersey. (Seal.)

REFUNDING PLAN

OF THE

City of Asbury Park

New Jersey

APPROVED BY THE NEW JERSEY SUPREME COURT ON JULY 21, 1937

October 1, 1937

I. F. HUNTZINGER CO., INC.
LAW PRINTERS
CAMDEN, NEW JERSEY

REFUNDING PLAN OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, NEW JERSEY

ARTICLE I.

Description of Refunding Bonds.

1. The Refunding Bonds to be issued and delivered by the City in exchange for a like principal amount of obligations surrendered will comprise $10,402,200 bonds authorized pursuant to an Act of the Legislature of the State of New Jersey, entitled "An Act concerning municipal finances," approved April 28, 1931, as amended and supplemented, and shall be valid and legally binding obligations of the City, and the City shall have power and be legally obligated to levy *ad valorem* taxes upon all the taxable property within the City for the payment of said bonds and interest thereon without limitation.

2. The Refunding Bonds shall be dated December 1, 1937, shall bear interest payable semi-annually, on the first days of June and December in each year, at the rate of 4% per annum until maturity on December 1, 1966. Said issue of bonds shall be redeemable as a whole or in part by lot on any interest payment date at par and accrued interest, upon notice of redemption given by publication at least once, not less than thirty days prior to the date of redemption, in a newspaper published and of general circulation in the City of New York, New York. Said bonds shall be coupon in form, registerable at the option of the holder as to principal only, or as to both principal and interest, and shall be payable in lawful money of the United States of America at the office of a banking institution or institutions in the City of Asbury Park, New Jersey, to be selected by the City, or at the option of the holder at the office of a bank or trust company in the Borough of Manhattan, City, County and State of New York, to be designated by the City in the resolution or resolutions authorizing the issuance of the Refunding Bonds. Refunding Bonds issued in exchange for less than $1,000 principal amount of Term, Serial and Other Bonds and Notes shall be in the denomination of $100 or $500

each and all other Refunding Bonds shall be in the denomination of $1,000 each. Cash payments will be made on such part of the principal amount of surrendered obligations as may be a multiple of $100.

3. Each of the Refunding Bonds shall contain a recital that it is issued for the purpose of refunding a valid and outstanding obligation of the City surrendered in exchange therefor and a provision that, in case of default in payment of the principal of or interest on such Refunding Bond, the holder thereof, shall not only have all the rights and remedies thereunder of a holder thereof, but in addition shall be reinvested with such of the rights or remedies which the holder would have had were the holder then the owner and in possession of the particular obligation so surrendered, as are specified in the resolution or resolutions authorizing the issuance of the Refunding Bond. The rights and remedies so specified in such resolution or resolutions shall consist of the remedies afforded by law and by contract for the enforcement of payment of the principal of or interest on the particular obligation so surrendered (exclusive, however, of any remedy involving the application to such payment of any receivables or other assets of the City acquired by the City prior to the issuance of the Refunding Bond), without limitation or impairment by reason of any statute enacted subsequent to the issuance of such particular obligation and prior to the issuance of the Refunding Bonds.

Said bonds shall be accompanied by the approving legal opinion, furnished at the expense of the City, of Hawkins, Delafield and Longfellow, New York City, that the Refunding Bonds will be the direct obligations of the City, payable as to both principal and interest from unlimited *ad valorem* taxes on all taxable property in the City.

ARTICLE II.

Delinquent Interest Adjustment.

In full satisfaction of all unpaid interest upon each of the $10,402,200 Term, Serial and Other Bonds and Notes of the City described in Schedule "A" annexed hereto, the City will pay in cash, a sum equal to 3% per annum for the period from January 1, 1934 to December 1, 1937, less any payments heretofore made on account of interest accruing after January 1, 1934.

ARTICLE III.

State Road Tax, Soldiers' Bonus and School Tax Bonds.

The $328,999.19 outstanding State Road Tax Funding Bonds, Soldiers' Bonus Bonds and School Tax Funding Bonds described in Schedule "A" annexed hereto will remain in their present form except that the $191,222.04 of the principal of these bonds in default shall, under agreement secured by the City, be paid in approximately equal annual instalments from 1938 to 1942, inclusive, and the City shall pay or adjust the past due interest.

ARTICLE IV.

Obligations of the City held by the Sinking Fund Commission of the City of Asbury Park.

The $781,329.50 obligations of the City held by the Sinking Fund Commission of the City, with all appurtenant and unmatured coupons attached, shall be delivered by the Sinking Fund Commission to the City and immediately cancelled by the City and all rights of bondholders therein released.

ARTICLE V.

Tax Levy for Debt Service, Etc.

Until the bonds herein refunded are paid, the City shall be required to appropriate annually and levy in its budget annually, the sum of $630,000 for debt service, including debt service required for bonds mentioned in Article III.

ARTICLE VI.

Revolving Fund.

As a bondholder's security feature of this plan, the City shall maintain in a National or State Bank to be designated by the City's governing body, a special account to be known as the "Revolving Fund," which shall be a reserve for financing the future operations of the City. The initial payment to be made into the Revolving Fund

shall consist of $225,000, which is the amount reserved from the available cash for working capital. Additional payments would be made into the Revolving Fund during the life of the bonds. These additional payments would consist of:

(a) All sums received in payment of taxes levied prior to January 1, 1938, whether received as taxes, as redemption of tax liens, or as realizations upon foreclosed property.

(b) All taxes levied in any year after 1937 which may be collected after all budgetary appropriations of the year have been met and in any event after the close of the year of the levy so that, *e. g.*, in substance, all 1938 taxes collected in 1938 and subsequent years will be paid into the Revolving Fund.

Since the City now collects only about 53% of its current tax levy during the year of levy and therefore cannot meet its operation expenses and State and County taxes and pay its debt service solely from current tax collections, the City may withdraw from the Revolving Fund from time to time, such amount as may be necessary to meet these payments required under its current budget. Upon making any such withdrawal, the City would place in the Revolving Fund, a certificate of withdrawal, showing the date and amount of the withdrawal. As taxes of that year are thereafter paid into the Revolving Fund, as above required, the amount of the payment will be credited on such certificate of withdrawal. If, at the end of the third year after the tax levy, the credits so made have not entirely discharged the certificate of withdrawal, the City will be obliged to raise by tax, the remainder of the certificate, and before the end of the fourth year, pay it into the Revolving Fund.

If, at the end of any year, the cash in the Revolving Fund exceeds $225,000.00, the amount of the excess will be withdrawn from the Revolving Fund and one-half of the excess will be put into the Debt Service Fund and the other half of the excess will be returned to the City, which may use it for reduction of the next year's tax levy.

Duplicate deposit slips and certificates of withdrawal will be transmitted to the Fiscal Agent by the City. The transactions of the Fund

shall be audited by a Registered Municipal Accountant, who shall be satisfactory to the Fiscal Agent and any improper application of funds pledged to, in, or withdrawn from the Fund, shall be remedied by immediate mandatory levy and payment into the Revolving Fund of the amount involved.

ARTICLE VII.

Debt Service Fund.

1. The City shall in each year provide budgetary appropriation for, and before each of the following dates in such year, pay in cash into the Debt Service Fund, an amount which, together with any amount therefore paid into the Debt Service Fund pursuant to this section in and for such year, will at least equal the amount set opposite each date in the following table:

Date	Amount
May 15	$250,000.00
August 15	450,000.00
November 15	630,000.00

Should the City fail in any year to pay into the Debt Service Fund, the full amount required by this section, the City shall include in the next succeeding tax levy in addition to all other amounts included therein required by law or by contract, or by any other provision of this resolution, an amount to be collected and paid into the Debt Service Fund sufficient to make up the said deficiency in the preceding year's payment, and thereafter, until said deficiency shall be made up, the City shall segregate and set aside out of each payment of taxes made under such tax levy, the proportion thereof which the amount so included in such tax levy, bears to the total of such tax levy, and shall immediately pay the amount so segregated and set aside into the Debt Service Fund.

2. The City shall appropriate and pay into the Debt Service Fund an additional dollar for every dollar by which the City's appropriation may exceed the amounts hereinafter designated for School Tax and City Operations, as follows:

Year	Operating Expenditures of the City	Total Tax Levy for School Purposes
1938	$757,000.00	$185,000.00
1939	772,000.00	200,000.00
1940	787,000.00	210,000.00
1941 and subsequent years	802,000.00 each	220,000.00 each

Provided, however, that if any increased appropriations are occasioned by, or for capital outlays, emergency relief, pensions, or mandatory salary increases, no increases for such sums shall be made in the appropriations for debt service.

3. The City shall maintain the Debt Service Fund in a depository to be designated by the City's governing body, such depository to act as the City's Fiscal Agent, in which fund shall be deposited, all funds accruing for the payment of debt service on the Refunding Bonds. The Debt Service Fund shall be applied by the Fiscal Agent to the payment of interest on bonds as same become due, but whenever the amount on hand exceeds the amount of such interest as will accrue within six months, the amount of the excess will be applied to the retirement of refunding bonds by call for tenders of bonds at less than par, or if no such tenders are received, by the call of bonds by lot for redemption. The Fiscal Agent shall have the power to enforce, by appropriate action, the duty of the City to make provision for, and to pay into the Revolving Fund or Debt Service Fund, all sums required of the City under the proposed plan of refunding. Duplicate deposit and withdrawal slips on the Revolving Fund shall be forwarded to the Fiscal Agent at the time of the Deposit or withdrawal. The Fiscal Agent shall be empowered to engage a Registered Municipal Accountant at the expense of the City, for the purpose of making interim audits of the transaction of the Revolving Fund.

ARTICLE VIII.

Reserve for Uncollectible Taxes.

1. There shall be included in each budget of the City, an appropriation under the caption "Reserve for Uncollectible Taxes" in an

amount not less than one-fifth of the amount of taxes levied in the City for next preceding year, which remained uncollected at the end of such next preceding year.

ARTICLE IX.

1. The City shall covenant and agree, upon the issuance of said Refunding Bonds, fully to carry out and perform all the provisions of Articles V, VI, and VII, and said provisions shall be a part of the contract with the holders of such Refunding Bonds, and shall be enforceable by mandamus or other appropriate action or proceedings at law or in equity instituted by any holder of any Refunding Bond in behalf of all holders of Refunding Bonds, whether or not there shall have been any default in the payment of the principal of or interest on any such Refunding Bond.

2. The City shall covenant and agree, upon the issuance of said Refunding Bonds, to carry out and perform all the provisions as previously outlined herein, so that such provisions would be definitely a part of the contract with the bondholders.

In addition to the proposed provisions already mentioned, the City shall further covenant and agree (a) to hold annual tax sales in the manner prescribed by law and not later than November 1st of each year; (b) proceedings to foreclose tax and other title liens at the earliest time permitted by law; (c) to offer at public sale each year, in accordance with law, all real estate held by the City in fee; and (d) to not accept bonds, notes or other obligations of the City in payment of, or discharge of taxes, or of other receivables of the City.

ARTICLE X.

This Refunding Plan was adopted by the City, upon the authorization of the Supreme Court of New Jersey, and the Municipal Finance Commission of the State of New Jersey, after extensive negotiations with creditor's groups. The City undertakes to secure the formal legal approval of this Refunding Plan by such State authorities as are required by the Laws of the State of New Jersey.

SCHEDULE A.

RESOLUTION AUTHORIZING THE ISSUANCE OF REFUNDING BONDS OF THE CITY OF ASBURY PARK, IN THE COUNTY OF MONMOUTH, NEW JERSEY.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ASBURY PARK, IN THE COUNTY OF MONMOUTH, NEW JERSEY, as follows:

ARTICLE I.

Authorization of Refunding Bonds.

For the purpose of funding or refunding an equal amount of the bonds and notes of the City of Asbury Park, in the County of Monmouth, New Jersey (hereinafter referred to as "City"), set forth and described in Article III of this resolution, bonds of the City, each to be known as "Refunding Bond," are hereby authorized to be issued in the aggregate principal amount of $10,735,199.19 pursuant to an Act of the Legislature of the State of New Jersey, entitled: "An Act concerning municipal finances," approved April 28, 1931, constituting Chapter 340 of the Laws of 1931, and the acts amendatory thereof and supplemental thereto.

ARTICLE II.

Description of Refunding Bonds.

SECTION 1. Said Refunding Bonds shall be dated December 1, 1937, shall bear interest at the rate of four per centum (4%) per annum, payable semi-annually on the first days of June and December in each year until maturity, shall mature December 1, 1966, shall be coupon in form, registerable at the option of the holder as to principal only or as to both principal and interest, shall be payable in lawful money of the United States of America, at the office of the Asbury Park & Ocean Grove Bank, in the City of Asbury Park, New Jersey, or, at the option of the holder, at the office of the Central Hanover Bank & Trust Company, in the Borough of Manhattan, City, County, and

State of New York, shall be signed by the Mayor, the City Treasurer and the City Manager, under the seal of the City, attested by the City Clerk, and the coupons annexed thereto shall be authenticated by the facsimile signature of said City Treasurer. Said Refunding Bonds, in addition to the other matters hereinafter stated, shall recite the title of the Act in pursuance of which they are issued and due compliance with all conditions precedent to their issuance, including debt and other limitations, and said Refunding Bonds shall be in such denominations and otherwise be in such form as may be determined by resolution. Said issue of Refunding Bonds shall be redeemable as a whole or in part by lot on any interest payment date at par and accrued interest, upon notice of redemption given by publication at least once at least thirty days prior to the date of redemption in a newspaper published and of general circulation in the City of New York, New York.

SECTION 2. Each of the Refunding Bonds which may be issued in exchange for any of the bonds and notes described in Article III of this resolution, shall contain a recital that it is issued for the purpose of funding or refunding a valid and outstanding obligation of the City surrendered in exchange therefor, and also a provision that, in case of default in payment of the principal of or interest on said Refunding Bond, the holder thereof shall not only have all the rights and remedies thereunder of a holder thereof, but in addition shall be reinvested with such of the rights and remedies which the holder would have had were the holder then the owner and in possession of the particular obligation so surrendered as are hereinafter in this section specified. Such rights and remedies are hereby specified as the remedies afforded by law and by contract for the enforcement of the payment of the principal of or interest on the particular obligation so surrendered (exclusive, however, of any remedy involving the application to such payment of any receivables or other assets of the City acquired by the City prior to the issuance of the Refunding Bond), without limitation or impairment by reason of any statute of the State of New Jersey enacted subsequent to the issuance of such particular obligation and prior to the issuance of the Refunding Bond, including specifically (if enacted during such period) Chapters 266 and 331 of the Laws of 1933 of the State of New Jersey, except to

the extent that any such act may have prior to such surrender legally and constitutionally affected the remedies of the person who was then the owner and in possession of the particular obligation so surrendered.

SECTION 3. Said Refunding Bonds shall be direct unlimited obligations of the City, and the City shall be obligated to levy *ad valorem* taxes upon all the taxable property within the City for the payment of the bonds and interest thereon without limitation of rate or amount, and the full faith and credit of the City shall be and is hereby pledged for the punctual payment of the principal of and interest on said Refunding Bonds.

ARTICLE III.

Debt to be Refunded.

SECTION 1. It is hereby found, determined and recited that the bonds and notes of the City described below are outstanding and unpaid; that said bonds and notes are valid and legally binding obligations of the City payable as to both principal and interest from unlimited *ad valorem* taxes upon all the taxable property within the City; that the principal amount of said bonds and notes are due or to become due to the several holders thereof; that the Municipal Finance Commission of the State of New Jersey, acting in and for the City, and functioning in pursuance of the Act cited in Article I of this resolution, after public hearing duly held after public notice, has found said bonds and notes to be outstanding and unpaid and to be due or to become due; and that said bonds and notes so described do not include any bonds or notes held by the Sinking Fund Commission of the City:

(a) Term Bonds.

Title, Designation or Purpose	Date of Issue	Annual Maturities Amount	Date	Principal Outstanding
School	7- 1-07		7- 1-37	$99,000.00
School	1- 1-13		1- 1-43	170,000.00
Sewer	9- 1-05		9- 1-45	33,000.00
Sewer	7- 1-07		7- 1-42	71,000.00
Sewer	5- 1-09		5- 1-44	35,000.00
Sewer	7- 1-12		7- 1-47	70,000.00
Fire	5- 1-09		5- 1-44	15,000.00
Beach	7- 1-07		7- 1-47	150,000.00
Beach	1- 1-11		7- 1-51	134,000.00
Water	4- 1-06		4- 1-36	22,000.00
Total Term Bonds				$799,000.00

(b) Serial and Other Obligations.

Tax Revenue Bonds, 1930	12- 5-30		12- 1-33	$105,000.00
Tax Revenue Bonds, 1931	6- 2-33		12- 2-33	76,000.00
Tax Revenue Bonds, 1932	6- 2-33		12- 2-33	317,000.00
Tax Revenue Bonds, 1932	6- 2-33		12- 2-33	2,000.00
Tax Revenue Bonds, 1933	9-15-33		3-15-34	2,000.00
Temporary Street Assessment Bonds	10- 1-28	$155,000.00	4- 1-34	
		50,000.00	4- 1-35	
		50,000.00	4- 1-36	
		50,000.00	4- 1-37	
		50,000.00	4- 1-38	355,000.00
School	6-20-24	$2,000.00	6-20-34—40	
		1,000.00	6-20-41—42	16,000.00
High School (Sunset Ave.)	9- 1-26	$20,000.00	9- 1-33	
		10,000.00	9- 1-34	
		20,000.00	9- 1-35—46	
		30,000.00	9- 1-47—58	
		13,000.00	9- 1-59	
		30,000.00	9- 1-60—65	
		28,000.00	9- 1-66	851,000.00
School	1- 1-28	$6,000.00	1- 1-34—38	
		7,000.00	1- 1-39	
		9,000.00	1- 1-40—66	226,000.00
School	11- 1-30	$6,000.00	11- 1-33—39	

		$7,000.00	11- 1-40	
		9,000.00	11- 1-41—55	184,000.00
Municipal Improvement	9- 1-17	$1,000.00	9- 1-33	
		5,000.00	9- 1-35—38	21,000.00
Public Improvement	11-15-26	$27,000.00	11-15-33—38	
		25,000.00	11-15-39	187,000.00
Improvement	5- 1-22	$6,000.00	5- 1-34—39	36,000.00
Street Improvement	10-15-28	$12,000.00	10-15-33—39	
		15,000.00	10-15-40	
		17,000.00	10-15-41—46	
		13,000.00	10-15-47	214,000.00
Floating Indebtedness	12-31-20	$5,000.00	12-31-33	
		5,000.00	12-31-35—40	35,000.00
Beach	7- 1-25	$14,000.00	7- 1-34	
		19,000.00	7- 1-35—45	
		20,000.00	7- 1-46	
		9,000.00	7- 1-47	252,000.00
Jetty	10- 1-22	$3,000.00	10- 1-34—43	
		2,000.00	10- 1-44—53	50,000.00
Water Consolidated Improvement	7- 1-25	$4,000.00	7- 1-34—60	
		5,000.00	7- 1-61—64	
		3,000.00	7- 1-65	131,000.00
Memorial Golf Course	9- 1-19	$2,500.00	9- 1-34—69	90,000.00
Memorial Golf Course	6- 1-21	$1,000.00	6- 1-50—72	23,000.00
Memorial Golf Course	4- 1-22	$500.00	4- 1-50—73	12,000.00
General Improvement Series "A"	5- 1-30	$8,000.00	5- 1-34—50	
		12,000.00	5- 1-51—76	376,000.00
General Improvement Series "B"	5- 1-30	$17,000.00	5- 1-34	
		15,000.00	5- 1-35	
		17,000.00	5- 1-36—53	
		24,000.00	5- 1-54	
		25,000.00	5- 1-55—70	762,000.00
General Improvement Series "C"	11- 1-30	$25,000.00	11- 1-33—38	
		30,000.00	11- 1-39—44	
		35,000.00	11- 1-45—57	$785,000.00

Refunding Series "A"	7- 1-33	$2,000.00	7- 1-34	
		1,000.00	7- 1-35—38	6,000.00
Refunding Series "A"	7- 1-33	$1,000.00	7- 1-34—36	3,000.00
Refunding Series "A"	7- 1-33	$2,000.00	7- 1-34	
		3,000.00	7- 1-35	
		4,000.00	7- 1-36—41	
		3,000.00	7- 1-42	
		2,000.00	7- 1-43	34,000.00
Refunding Series "B"	7- 1-33	$1,000.00	7- 1-34—39	6,000.00
Refunding Series "B"	7- 1-33	$3,000.00	7- 1-34—37	12,000.00
Refunding Series "B"	7- 1-33	$4,000.00	7- 1-38—39	8,000.00
Refunding Series "B"	7- 1-33	$5,000.00	7- 1-40—43	20,000.00
Refunding Series "A"	9- 1-33	$1,000.00	9- 1-34—41	8,000.00
Refunding Series "B"	9- 1-33	$2,000.00	9- 1-34—35	
		1,000.00	9- 1-36	5,000.00
Refunding Series "B"	9- 1-33	$1,000.00	9- 1-37—39	
		2,000.00	9- 1-40	5,000.00
Refunding Series "B"	9- 1-33	$2,000.00	9- 1-41	2,000.00
Refunding Series "B"	9- 1-33	$1,000.00	9- 1-42	1,000.00
Refunding Series "B"	9- 1-33	$2,000.00	9- 1-43	2,000.00
Refunding 1930 Tax Revenue Bonds	12-10-33	$18,000.00	12-10-38—40	
		25,000.00	12-10-41—42	104,000.00
Consolidated Improvement Casino	6- 1-29	.....	12- 1-33	377,000.00
Consolidated Improvement Casino	6- 1-29	.....	12- 1-34	980,000.00
Consolidated Improvement Casino	6- 1-29	.....	6- 1-35	1,000,000.00
Consolidated Improvement Casino	4- 1-30	.....	4- 1-34	460,000.00
Library-Repairs and Furnishing ..	1-10-33	.....	1-10-36	5,000.00
Temporary Loan	4- 1-33	.....	4- 1-36	200,000.00
Convention Hall and Theatre	9- 1-33	.....	12- 1-33	650,000.00
Foot Bridges, Wesley Lake, O. G. C. M. Ass'n	9-22-33	.....	9-22-34	10,000.00
Consolidated Improvement Casino	9- 1-33	.....	12- 1-33	500,000.00
Consolidated Improvement Casino	12- 1-33	.....	6- 1-34	96,000.00
Water Tower	8-15-33	.....	8-15-35	5,200.00
Total Serial and Other Obligations				$9,607,200.00

(c) State Tax Funding Bonds.

Funding 1930-1932 State School Tax	3- 8-34	$40,222.92	3- 8-35—37	
		40,222.93	3- 8-38—39	$201,114.62
Funding 1931-1932-1933 State Road Tax	7-15-34	$13,308.24	7-15-35	
		14,000.00	7-15-36—42	111,308.24
Funding 1931-1932-1933 Soldiers' Bonus Tax	7-15-34	$2,576.33	7-15-35	
		2,800.00	7-15-36—40	16,576.33
Total State Tax Funding Bonds				$328,999.19
GRAND TOTAL				$10,735,199.19

SECTION 2. The authorization in Article I of this resolution of the funding or refunding of bonds or notes shall be deemed to include authorization of the *pro tanto* funding or refunding of any judgments for the principal amount of such bonds or notes.

ARTICLE IV.
Special Funds.

SECTION 1. The City hereby establishes and, until payment of all Refunding Bonds shall be made or provided for in cash, shall maintain the following funds:

(a) A reserve fund for the financing of future operations of the City, and also, to the extent hereinafter provided, for the payment of the Refunding Bonds, denominated and hereinafter referred to as "Revolving Fund"; and

(b) A reserve or sinking fund solely for the payment and security of the principal of and interest on the Refunding Bonds, denominated and hereinafter referred to as "Debt Service Fund."

SECTION 2. The Debt Service Fund shall be and remain in the custody of the Fiscal Agent hereinafter provided for on the terms and conditions of this resolution.

SECTION 3. The Revolving Fund, and the moneys and funds held or credited or required to be held or credited therein, shall be

segregated from all other moneys and funds of the City and shall be treated by all officers of the City as moneys and funds held in trust solely for the purposes of the Revolving Fund. Such fund shall be kept in a separate bank account held in trust for the purposes herein named and shall not be commingled with any other moneys unless lawfully secured by deposit with the Fiscal Agent of direct obligations of the United States of America or of the State of New Jersey having a market value equal to or exceeding the amount of the fund. With respect to the Revolving Fund, the City shall comply with and perform the provisions of Section 307 of an Act of the Legislature of the State of New Jersey, entitled: "An Act concerning municipal and county finances (Revision of 1936)," approved June 24, 1936, constituting Chapter 211 of the Pamphlet Laws of 1936. At its expense and cost, the City shall cause an audit to be made at least once in each month by a Registered Municipal Accountant of the State of New Jersey named by or satisfactory to the Fiscal Agent of all transactions of or in any way affecting the Revolving Fund during the preceding calendar month and shall cause a duplicate original of the report of each such monthly audit to be delivered to the Fiscal Agent. The report of the audits made for the months of June and December in each year shall contain a summary of the audits made for the six months ending with such month. At its expense and cost, the City shall cause such summaries of audits to be published within fifteen days in its official newspaper.

ARTICLE V.

The Fiscal Agent.

Section 1. The Hudson County National Bank of Jersey City, New Jersey, and the Asbury Park & Ocean Grove Bank of Asbury Park, New Jersey, collectively, are hereby appointed Fiscal Agent on the terms and conditions hereinafter set forth, for the benefit and security of the City and all holders of Refunding Bonds of said City. In the event that either of said institutions shall not act or be acting as such Fiscal Agent, the appointment of the other of said institutions shall be automatically and simultaneously revoked, and a successor Fiscal Agent shall thereupon be appointed in accordance with the terms of Section 5 of this Article. Notwithstanding the foregoing appointment of both of said institutions collectively as Fiscal Agent, each of said institu-

tions shall have full power as if it were sole Fiscal Agent to take any and all action authorized hereunder to enforce any agreement or covenant of the City made in this resolution or any legal obligation of the City with respect to the Refunding Bonds.

SECTION 2. The Fiscal Agent shall have power (in addition to and not in substitution for the right of any individual holders of Refunding Bonds to exercise the same power) but shall not be under any duty, to enforce, by mandamus or other appropriate action or proceeding at law or in equity, in the name of, and with the consent of a holder of Refunding Bonds, the duty of the City to make provision for, and pay into the Revolving Fund or Debt Service Fund all sums required of the City under this resolution to be paid into the Revolving Fund or the Debt Service Fund, but any such suit, action or proceeding, in so far as the Fiscal Agent is concerned but not in so far as individual holders of Refunding Bonds are concerned, shall be abandoned, dismissed, continued, amended or otherwise changed upon request filed with the Fiscal Agent by the holders of two-thirds in principal amount of the Refunding Bonds then outstanding. Any such request, and the right and qualification of any person, partnership or corporation to make such request, may be conclusively evidenced by a written instrument, purporting to be signed by such person, partnership or corporation, and signed by a bank, banker or trust company within ninety days prior to the filing thereof, describing the Refunding Bonds claimed to be held by such person, partnership or corporation, and stating that such Refunding Bonds were exhibited by such person, partnership or corporation to an officer of such bank, banker or trust company at a date within such period of ninety days.

SECTION 3. All moneys held in or credited to the Debt Service Fund shall be held by the Fiscal Agent and all other banks or trust companies in trust for the purposes herein named, and shall not be commingled with any other moneys whatsoever unless and until lawfully secured by direct obligations of the United States of America or of the State of New Jersey, having a market value equal to or exceeding the amount of such moneys.

SECTION 4. The Fiscal Agent shall be entitled to reasonable compensation for its services in the administration of the Debt Service Fund and acting as such Fiscal Agent, and to reimbursement of its

reasonable expenses, and the City shall promptly pay such compensation and make such reimbursement to the Fiscal Agent.

SECTION 5. The City may at any time by resolution of the City Council revoke the appointment as Fiscal Agent of the Hudson County National Bank and the Asbury Park & Ocean Grove Bank, collectively, or of any successor Fiscal Agent. In the event that for any reason the Fiscal Agent or any successor Fiscal Agent shall not act or be acting as Fiscal Agent, within fifteen days the City shall by resolution of the City Council appoint a successor Fiscal Agent. If the City shall, for any reason, fail so to appoint a successor Fiscal Agent within such period of time, any holder of Refunding Bonds may deliver to the City Clerk or any other officer of the City, an instrument in writing appointing a successor Fiscal Agent in accordance with this resolution. The first appointment so filed shall control, and the City shall not be entitled to revoke such appointment for a period of one year thereafter. Any such successor Fiscal Agent shall be a single bank or trust company having its principal office in the State of New Jersey, and no such bank or trust company shall be appointed as such successor Fiscal Agent unless it shall appear from its last statement of condition next preceding its appointment, given pursuant to call of officials of the United States of America or of the State of New Jersey, that its capital, surplus and undivided profits aggregate not less than $3,000,000. In the event of the appointment of a successor Fiscal Agent, as in this section provided, the then Fiscal Agent shall surrender all the moneys, funds, certificates and other assets held by it hereunder to the successor Fiscal Agent and take its receipt therefor, which receipt shall be deemed to constitute a release in full of all liabilities and duties hereunder of the then Fiscal Agent.

SECTION 6. The recitals of fact herein and in the Refunding Bonds contained shall be taken as the statement of the City and the Fiscal Agent shall be under no responsibility for the correctness of the same. The Fiscal Agent shall be protected in acting upon and shall be entitled to assume and rely on the accuracy, correctness and genuineness of any notice, resolution, certificate, statement, report, accounts and other documents furnished it by the City, which are signed by its Mayor or City Manager under its seal, attested by its City Clerk. The Fiscal Agent may consult with counsel and the opinion of such counsel shall be full and complete authorization and protection in respect of any

action taken or suffered by the Fiscal Agent hereunder in good faith and in accordance with the opinion of such counsel. The Fiscal Agent may execute any of the duties or powers hereof and perform any duty hereunder either itself or by or through its attorney, agent or employees, and it shall not be answerable or accountable for any act, default, neglect or misconduct of any such attorney, agent or employees, if reasonable care has been exercised in the appointment and retention thereof, nor shall the Fiscal Agent be otherwise answerable or accountable under any circumstances whatsoever except for its own gross negligence or affirmative misconduct.

ARTICLE VI.

Debt Service Fund and Retirement of Refunding Bonds.

SECTION 1. The City shall in each year provide budgetary appropriation for, and before each of the following dates in such year pay in cash into the Debt Service Fund, an amount which, together with any amount theretofore paid into the Debt Service Fund pursuant to this section in and for such year, will at least equal the amount set opposite such date in the following table, as such amount may be affected by the operation of Section 2 and Section 3 of this Article:

Date	Amount
May 15	$250,000
August 15	450,000
November 15	630,000

SECTION 2. The amount in any of the following years to be provided by budgetary appropriation and paid before November 15 in cash into the Debt Service Fund by the City pursuant to Section 1 of this Article shall be further increased in such year, if necessary, so that it will at least equal the larger of the two following amounts which may be required in such year:

(a) In the year 1947 and each year thereafter, in order to assure payment of the principal of and interest on the Refunding Bonds at or before maturity, an amount computed annually by multiplying the principal amount of all Refunding Bonds outstanding on January 1 of such year and not then called for prior redemption, by the factor set opposite such year in the following table:

Year	Factor	Year	Factor
1947	.0735817	1957	.1232909
1948	.0761386	1958	.1344930
1949	.0789933	1959	.1485278
1950	.0821985	1960	.1666096
1951	.0858200	1961	.1907619
1952	.0899411	1962	.2246271
1953	.0946690	1963	.2754900
1954	.1001437	1964	.3603485
1955	.1065522	1965	.5301961
1956	.1141490	1966	1.0000000

(b) In each year, the amount required pursuant to Section 1 of this Article plus an amount equal to the amount by which the sum of the budgetary appropriations for operating expenditures of the City, or the total tax levy for local school purposes, for such year exceeds the amount specified for such purpose for such year in the following table:

Year	Operating Expenditures of the City	Total Tax Levy for Local School Purposes
1938	$757,000.	$185,000.
1939	772,000.	200,000.
1940	787,000.	210,000.
1941 and subsequent years	802,000. each	220,000. each

For the purpose of this paragraph (b), the term "operating expenditures of the City" shall mean all expenditures authorized by virtue of the budget, tax resolution or ordinance or tax levy in the City, including without limitation of the foregoing, all expenditures on account of any municipal enterprise or utility, whether owned or operated by the City or by a Commission or other public body established by statute, including without limitation of the foregoing the beach front, the golf course and the water supply and distribution system, excepting only (1) interest and debt redemption charges; (2) expenditures for the construction or acquisition of any improvement of a permanent nature which, but for debt limitations, could be legally financed by the issuance of bonds; (3) expenditures for poor relief for which any expenditure or contribution (by a grant or loan of money or by providing

labor, supplies, material or supervision, or otherwise) may be made by or may be sought from any officer, board, agency or commission of the State of New Jersey or of the United States of America, such as the President, the Federal Emergency Administration of Public Works, the Works Progress Administration, the Reconstruction Finance Corporation, and any successor or successors thereof, or any officers, boards, agencies or commissions heretofore or hereafter constituted for similar purposes with similar powers; (4) State, County and local school district taxes; (5) reserves; (6) expenditures in excess of the amount required by law on account of pension funds for employees of the City; and (7) in the years 1938, 1939 and 1940, any excess (not exceeding $45,000 in the year 1938, $30,000 in the year 1939, and $15,000 in the year 1940) of expenditures for compensation of present officers and employees of the City, or their successors, (but not of additional officers or employees) over the expenditures for the same purpose in the year 1936, if the excess is made necessary solely by the lapsing or expiration of, or the failure of the Legislature of the State of New Jersey to renew, extend or substantially reenact, the acts of the State of New Jersey cited as Chapters 14, 16, 17, or 18 of the Laws of 1933, as heretofore amended. For the years 1938, 1939 and 1940, the amount specified in the foregoing table for the total tax levy for local school purposes may be increased, if necessary, by the amount of any excess (not exceeding $35,000 in the year 1938, $20,000 in the year 1939, and $10,000 in the year 1940) of expenditures for compensation of present officers, teachers and employees of the Board of Education of the City, or their successors, (but not of additional officers, teachers or employees) over the expenditures for the same purpose in the year 1936, if the excess is made necessary solely by the lapsing or expiration of, or the failure of the Legislature of the State of New Jersey to renew, extend or substantially reenact, the act of the State of New Jersey cited as Chapter 12 of the Laws of 1933, as heretofore amended.

Section 3. The gross amount in any of the years 1938, 1939, 1940, 1941 and 1942 to be provided by budgetary appropriation and paid before November 15 in cash into the Debt Service Fund by the City pursuant to Section 1 of this Article, as such amount may be affected

by the operation of Section 2 of this Article, may be reduced in such year by the amount of any appropriation made in the budget of such year for the payment of principal of or interest on the State Tax Funding Bonds of the City described in subdivision (c) of Section 1 of Article III of this resolution; *provided, however,* that such amount so to be provided and paid shall not in any event be reduced in any year below the amount of all interest payable in such year on all Refunding Bonds outstanding on January 1 of such year and not then called for prior redemption.

SECTION 4. Should the City fail in any year to pay into the Debt Service Fund the full amount required by Section 1 of this Article, as such amount may be affected by the operation of Section 2 and Section 3 of this Article, the City shall include in the next succeeding tax levy in addition to all other amounts included therein required by law or by contract or by any other provision of this resolution, an amount to be collected and paid into the Debt Service Fund sufficient to make up the said deficiency in the preceding year's payment, and the City on or before August 1 of the year of such tax levy shall pay the full amount so included in such tax levy into the Debt Service Fund.

SECTION 5. The City shall pay into the Debt Service Fund the moneys required to be transferred thereto from the Revolving Fund pursuant to Section 4 of Article VII of this resolution.

SECTION 6. The Fiscal Agent shall apply the available moneys in the Debt Service Fund to the payment of all interest becoming due on the outstanding Refunding Bonds not otherwise provided for but whenever the available moneys in the Debt Service Fund shall exceed the amount of all interest which will accrue on the outstanding Refunding Bonds during the next ensuing six months and are not less than the amount of all interest which will become due on the outstanding Refunding Bonds during the then current year, the Fiscal Agent shall apply the available moneys in excess of such amount to the retirement of Refunding Bonds, as provided in Section 7 of this Article of this resolution.

SECTION 7. At any time when the City is not in default in making any payments required by this Article and there are available in the Debt Service Fund monies applicable to the retirement of Refunding Bonds (hereinafter referred to as "applicable monies"), the Fiscal

Agent may in its discretion and shall within fifteen days, if requested by resolution of the City Council of the City, or if on March 1 or September 1 of any year the applicable monies exceed $25,000, call for public tenders of Refunding Bonds at not exceeding par and accrued interest and use such applicable monies as in this section provided. Not more than thirty nor less than fifteen days prior to the date fixed for the receipt of tenders, the Fiscal Agent shall cause to be published in a financial newspaper published in the Borough of Manhattan, City, County and State of New York, a notice in the name of the City stating the amount of applicable monies, inviting tenders of Refunding Bonds, and fixing a time and place at which such tenders will be received by the Fiscal Agent. Such tenders of Refunding Bonds shall be enclosed in plain sealed envelopes marked "Tender of Refunding Bonds," and shall be opened by the Fiscal Agent in public on the date fixed in the notice inviting tenders. An officer of the City designated by resolution of the City Council shall be entitled to attend, and except in the case of tenders received between March 15 and April 15 and between September 15 and October 15 of each year, such officer may after the opening of the tenders require the Fiscal Agent to reject all tenders, or all tenders in excess of a certain price to be fixed by such officer. Subject to the exercise of this right of rejection, as much of the applicable monies as the acceptable tenders permit shall be applied immediately to the purchase of Refunding Bonds tendered at the lowest prices submitted. In the event that a greater amount of Refunding Bonds is tendered at the same price than can be purchased with the applicable monies (after all bonds tendered at lower prices, if any, shall have been purchased), then any of the Refunding Bonds so tendered at said price shall be purchased at said price in such manner and order as the Fiscal Agent shall prescribe. The Fiscal Agent shall apply the available applicable monies on hand on April 15 and October 15 of any year, unless such monies do not exceed $25,000, to the redemption by lot on the next succeeding interest payment date of as many as the amount of such monies permit of Refunding Bonds and shall cause notice of redemption of such Refunding Bonds to be published in the manner and time provided in such Refunding Bonds. All Refunding Bonds purchased or redeemed shall be cancelled by the Fiscal Agent and delivered to the City Treasurer or City Clerk.

ARTICLE VII.

Revolving Fund and Future Operation.

SECTION 1. From time to time as the same may be collected or realized, the City shall pay into the Revolving Fund:

(a) Collections or receipts of all special assessments on property in the City specially benefited heretofore or hereafter confirmed on account of any improvement financed or undertaken prior to January 1, 1937;

(b) Collections or receipts of all taxes levied on property in the City for the year 1936 or any prior year; and

(c) After all expenditures or disbursements required by virtue of the budget, tax resolution or ordinance or tax levy in the City for the year 1937 and each of the several subsequent years have been made or provided for, all collections or receipts of taxes levied on property in the City for such year, and of other revenues anticipated for such year, except such collections or receipts after the end of such year on account of services rendered by any municipal enterprise or utility as may have been lawfully stated in the budget of a subsequent year as an anticipated revenue.

Such collections or receipts shall include all monies received upon the redemption, sale or other disposition of any tax title or lien or assessment title or lien to real estate, or upon the foreclosure, sale or other disposition of any real estate acquired by the City in connection with the enforcement or other settlement of the taxes, special assessments or other revenues, as the case may be. All such collections and receipts shall be pledged directly to the Revolving Fund and shall not be diverted or applied to any other payment or purpose or commingled with any other monies or funds. The City shall furnish to the Fiscal Agent at the time of each such payment into the Revolving Fund a duplicate deposit slip and a statement correctly showing the sources of the moneys so paid into the Revolving Fund, classified in accordance with the above paragraphs of this section, and also, as to any collections or receipts paid pursuant to paragraph (c) above, the several years for which the taxes and revenues so collected or received and

paid over were levied or anticipated, and the amount of such collections and receipts for each such year included in such payment.

SECTION 2. For the purpose of meeting expenditures or disbursements (other than the payments required by Section 1 or Section 4 of Article VI of this resolution), required by virtue of the budget, tax resolution or ordinance or tax levy in the City for any year, the City shall be entitled, and for the purpose of meeting the payments in such year required by Section 1 or Section 4 of Article VI of this resolution, the City shall be required to withdraw during such year from the Revolving Fund such sums as may be necessary for such purposes during the period of one month next ensuing after the date of such withdrawal. Upon making any such withdrawal, the City shall deliver to the Fiscal Agent a receipt for, or other document acknowledging the withdrawal of, the money so withdrawn (hereinafter referred to as "certificate of withdrawal") which shall show the amount withdrawn and the date of such withdrawal. There shall be credited upon the amount so shown in such certificate of withdrawal the amount of each payment thereafter made into the Revolving Fund of collections or receipts of taxes levied on property in the City and of other revenues anticipated for the year in which such certificate of withdrawal is dated, as shown in the statements delivered to the Fiscal Agent pursuant to Section 1 of this Article of this resolution, as the same may be corrected in accordance with any audit delivered to the Fiscal Agent pursuant to Section 3 of Article IV of this resolution. Whenever the credits so made and any other credits thereon shall equal or exceed the amount shown in such certificate of withdrawal, it shall be cancelled and returned to the City.

SECTION 3. In each year, the City shall provide budgetary appropriation for, and on or before December 15 of such year shall pay in cash into the Revolving Fund, a sum not less than the amount of all certificates of withdrawal theretofore delivered to the Fiscal Agent pursuant to Section 2 of this Article which bear dates in or before the fourth year preceding such year, less the credits thereon, and there shall be credited upon the amount so shown in such certificates of withdrawal the amounts so paid into the Revolving Fund. In the event that the City shall in any year incur losses with respect to the principal of any taxes or special assessments on property specially benefited

by remitting the same or accepting in discharge of the principal amount thereof less than the full amount due to the City, then in the next following year the City shall also provide budgetary appropriation for, and on or before December 15 of such year pay in cash into the Revolving Fund, a sum not less than the amount of the losses so incurred; *provided, however*, that this provision shall not be deemed to apply to any losses incurred in connection with the sale of foreclosed property and shall not apply to any such loss incurred with respect to special assessments or taxes on property in a transaction which complies with the following description:

(a) The transaction shall not have been in violation of the laws of the State of New Jersey;

(b) The loss shall have been with respect to taxes levied prior to January 1, 1934, or with respect to special assessments on property specially benefited on account of an improvement undertaken prior to January 1, 1937;

(c) The transaction shall have occurred prior to January 1, 1942;

(d) Prior to the transaction, the Registered Municipal Accountant referred to in Section 3 of Article IV of this resolution shall have approved the same and shall have certified that an adequate reserve exists to which such loss shall properly be charged; and

(e) At the time of the transaction, all delinquent taxes on the property levied since January 1, 1934, shall have been paid in full in cash.

Simultaneously with any such payment into the Revolving Fund, the City shall deliver to the Fiscal Agent a statement correctly showing the nature and amount of, and provision of this resolution requiring, such payment.

SECTION 4. If at the end of any year the monies held in cash in the Revolving Fund exceed $225,000, one-half of the amount of such excess shall forthwith be withdrawn from the Revolving Fund by the City and paid into the Debt Service Fund. The balance of such excess shall be held intact in the Revolving Fund until the final adoption of

the budget of the City for the following year, and to the extent that such balance is stated in such budget as an anticipated revenue for such year, such balance shall forthwith be withdrawn from the Revolving Fund by the City and applied to any expenditure authorized in such budget, but if the total amount of such balance is not so stated as an anticipated revenue in such budget, any part of such balance not so stated shall forthwith be withdrawn from the Revolving Fund by the City and paid into the Debt Service Fund.

SECTION 5. There shall be included in each budget of the City an appropriation, under the caption "Reserve for Uncollectible Taxes," in an amount not less than one-fifth of the amount of the taxes levied in the City for the next preceding year which remained uncollected at the end of such next preceding year. For the purpose of computation of the amount of said appropriation, no monies tendered to or accepted by the City in payment of taxes, special assessments on property specially benefited or other charges or liens on any property shall be deemed to constitute collection in whole or in part of taxes levied on such property for any year unless all taxes, special assessments on property specially benefited and other charges or liens on such property payable in any previous year shall have been paid or discharged, or the payment thereof lawfully provided for by installments, none of which is in arrears.

SECTION 6. In each year, the City shall levy a tax for local purposes at least equal to the aggregate amount of all appropriations included in the budget for such year, including without limitation of the foregoing the appropriation under the caption "Reserve for Uncollectible Taxes" and appropriations for any expenditures for any purpose theretofore made without appropriation or authorization, or in excess thereof, after deducting therefrom the estimated anticipated revenues for such year which estimated anticipated revenues shall not in any event be any sum or sums of money other than, or in excess of, the following:

(a) Any balance of excess monies in the Revolving Fund held therein pending adoption of the budget pursuant to Section 4 of Article VII of this resolution which is stated in such budget as an anticipated revenue;

(b) Any sum or sums of money anticipated in such budget and applicable to any lawful expenditure thereunder, certified by an officer, board, agency or commission of the State, as receivable in cash by or for the account of the City during such year under existing legislation from such officer, board, agency or commission, or from the State through such officer, board, agency or commission, free from any set-off or counter-claim;

(c) Miscellaneous revenues anticipated in such budget and applicable to any lawful expenditure thereunder, not (unless the prior written consent of the State Auditor of the State of New Jersey be had) in any instance or as to any item in an amount in excess of the amount of such miscellaneous revenues collected in cash during the next preceding year;

(d) Fees, rentals or charges for services rendered by any municipal enterprise or utility anticipated in such budget and applicable to any lawful expenditure thereunder, not in excess of the amount of such fees, rentals or charges received in cash during the next preceding year; and

(e) Collections of special assessments on property specially benefited, finally confirmed on or before the first day of such year on account of any improvement undertaken after January 1, 1937, anticipated in such budget and applicable to any lawful expenditure thereunder, not in excess of the amount thereof held in cash at the beginning of such year.

SECTION 7. (a) Taxes and special assessments on property specially benefited due to the City shall be payable in cash and the City shall not accept bonds, notes or other obligations of the City in payment or discharge of such taxes or special assessments due to the City.

(b) The City shall in 1938 and in each year thereafter, immediately after the time when such sales may, by law, be held and in any event prior to November 1 of said year, hold a complete sale of property for delinquent taxes or special assessments or other municipal charges or liens in accordance with law.

(c) The City shall at the earliest time permitted by law initiate proceedings to foreclose liens on or titles to real estate heretofore since January 1, 1931, or hereafter acquired by it at any sale or sales

for delinquent taxes or special assessments or other municipal charges or liens and shall prosecute such proceedings to a conclusion with all reasonable speed.

(d) The City shall at least once in 1938 and each year thereafter offer at public sale, in accordance with law, not later than November 1 of said year, all real estate then held in fee by the City and heretofore since January 1, 1931, or hereafter acquired by the City in connection with the foreclosure or other enforcement of taxes, special assessments or other charges or liens; *provided, however*, that this provision shall not apply to a parcel of such real estate if prior to the time of such offering the City shall have paid into the Revolving Fund, in addition to all other moneys required by this resolution to be so paid, a sum equal to the lien value of such parcel as hereinafter defined. At such offering for sale, the City may accept any legally acceptable bid for any parcel of real property so offered. At such offering for sale, the City shall accept any legally acceptable bid for any parcel of real property so offered of not less than the lien value of such parcel, being the lien value of the taxes, special assessments and other charges and liens on such parcel as of the last day of the month next preceding the acquisition of such parcel by the City, and such bid, if legally acceptable, shall be so accepted whether the total purchase price shall be payable in cash in full not later than the date of the delivery of the deed to the parcel, or in cash to the extent of twenty per centum of the purchase price not later than such date and the balance adequately secured in not more than ten equal annual installments, with interest on unpaid balances payable at least semi-annually at not less than four per centum per annum. The City may at any time within thirty days after the offering of any such real estate at public sale, accept any legally acceptable offer for any parcel of such real estate of a price not less than the highest price bid for such parcel at such public sale, or if no bid was received therefor at such public sale, then at a price exceeding the amount determined by resolution of the City Council of the City to be the fair market value of such parcel. The City may at any time accept any legally acceptable offer for any parcel of such real estate which the City would by virtue of this section have been required to accept if the offer had been made at the public sale required by this section. The proceeds of the sale of any of such real estate shall be paid into the

Revolving Fund by the City in accordance with the requirements of Section 1 of Article VII of this resolution. The City shall not sell any parcel of such real estate except as hereinabove provided.

ARTICLE VIII.

Covenants With Bondholders.

The City hereby covenants and agrees, upon the issuance of any of said Refunding Bonds, fully to carry out and perform all of the provisions of Articles IV, V, VI and VII of this resolution, and said provisions shall be a part of the contract with the holders of such Refunding Bonds, and shall be enforceable by mandamus or other appropriate action or proceeding at law or in equity instituted by the Municipal Finance Commission of the State of New Jersey, functioning in pursuance of the acts cited in Article I of this resolution, or by the holder of any Refunding Bond on behalf of all the holders of said Refunding Bonds, whether or not there shall have been any default in the payment of the principal of or interest on any such Refunding Bonds.

ARTICLE IX.

Miscellaneous Provisions.

Section 1. Wherever used in this resolution, unless the context clearly requires a different meaning:

(a) The term "City Council" shall mean the City Council of the City as presently constituted, or any other body or board hereafter constituted by whatsoever name it may be known having charge of the finances of the City;

(b) The term "year" shall mean a period beginning on January 1 and ending on December 31 next ensuing.

Section 2. Upon the retirement of any of the Term Bonds of the City described in subdivision (a) of Section 1 of Article III of this resolution, either by payment thereof in cash or by the exchange thereof for Refunding Bonds authorized by this resolution, the Sinking Fund Commission of the City shall cancel a ratable proportion of the notes, bonds or other obligations of the City then held by it and

deliver the obligations so cancelled to the City, and shall also pay to the City Treasurer a ratable proportion of any monies or funds in the custody of the said Commission. The monies or funds so paid to the City Treasurer shall be applied by him only to the payment of unpaid interest on notes and bonds owing by the City, in such manner and amount as may be determined by resolution approved by the Municipal Finance Commission of the State of New Jersey functioning in pursuance of the acts cited in Article I hereof.

Section 3. This resolution shall be published once in full within one week in the "Asbury Park Press," a newspaper published and circulating in the City and designated as the official newspaper of the City for such purpose. This resolution shall take effect immediately upon such publication, but the City shall not commence to operate under the terms and provisions of Article IV, V, VI and VII of this resolution until the first date when some of said Refunding Bonds shall be issued and delivered.

SCHEDULE B.

RESOLUTION DETERMINING THE FORM OF REFUNDING BONDS OF THE CITY OF ASBURY PARK, IN THE COUNTY OF MONMOUTH, NEW JERSEY, AND PROVIDING FOR THE SALE, DELIVERY OR EXCHANGE THEREOF.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ASBURY PARK, IN THE COUNTY OF MONMOUTH, NEW JERSEY, as follows:

SECTION 1. The Refunding Bonds of the City of Asbury Park, in the County of Monmouth, New Jersey, authorized to be issued pursuant to a resolution entitled: "Resolution authorizing the issuance of Refunding Bonds of the City of Asbury Park in the County of Monmouth, New Jersey," duly certified to the City Council of the City by the Municipal Finance Commission of the State of New Jersey, acting in and for the City, shall be substantially in the following form:

(Form of Bond)

No. **UNITED STATES OF AMERICA** $

State of New Jersey County of Monmouth City of Asbury Park

REFUNDING BOND.

The City of Asbury Park, in the County of Monmouth, a municipal corporation of the State of New Jersey, for value received, promises to pay to the bearer of this bond, or if it be registered, to the registered holder, the sum of dollars ($) on the first day of December, 1966, and to pay interest thereon at the rate of four percentum (4%) per annum, semi-annually on the first days of June and December in each year from the date of this bond until it matures, upon presentation and surrender as they severally mature of the coupons therefor annexed hereto, or if this bond be registered as to both principal and interest, then to the

registered holder. Both principal and interest of this bond will be paid in lawful money of the United States of America at the office of the Asbury Park & Ocean Grove Bank, in the City of Asbury Park, New Jersey, or, at the option of the holder, at the office of the Central Hanover Bank & Trust Company, in the Borough of Manhattan, City, County and State of New York.

This bond may be registered as to principal by the holder in his name on the books of the City kept in the office of the City Treasurer, and such registration shall be noted on the back of this bond, after which no valid transfer of this bond shall be made except on said books until after registered transfer to bearer. Such registration shall not affect the negotiability of the coupons which shall continue to pass by delivery. At the request of the holder, this bond will be converted into a bond registered as to both principal and interest and the coupons annexed hereto detached and cancelled and thereafter both principal and interest shall be payable only to the registered holder.

This bond is one of an issue, the authorized principal amount of which is $10,735,199.19, the bonds of which are of like tenor except as to number and denomination, and is issued pursuant to and in full compliance with an Act of the Legislature of the State of New Jersey, entitled: "An Act concerning municipal finances," approved April 28, 1931, constituting Chapter 340 of the Laws of 1931, and the acts amendatory thereof and supplemental thereto, and by virtue of a resolution entitled: "Resolution authorizing the issuance of Refunding Bonds of the City of Asbury Park, in the County of Monmouth, New Jersey," duly certified under date of to the City Council of the City by the Municipal Finance Commission of the State of New Jersey, acting in and for the City pursuant to said Act as amended and supplemented, and duly adopted by or on behalf of said City, and published as required by law.

The bonds of the issue of which this bond is one are all entitled to the security, and the holders thereof have the rights, powers and privileges, afforded by certain special covenants and provisions contained in said resolution, to which reference is hereby made for a statement of such security, rights, powers and privileges and of the obligations of the City thereunder.

This bond is issued for the purpose of refunding a valid and outnding obligation of the City surrendered in exchange therefor, and, ase of default in payment of the principal of or interest on this d; the holder thereof shall not only have all the rights and remedies reunder of a holder thereof, but in addition shall be reinvested with h of the rights and remedies which the holder would have had were holder then the owner and in possession of the particular obligan so surrendered, as are specified in Section 2 of Article II of said olution.

The issue of bonds, of which this bond is one, is subject to redemn at the option of the City on any interest payment date as a whole in part by lot, and this bond may be so redeemed upon notice of emption, given in the name of the City by publication at least once least thirty (30) days prior to the date of redemption, in a newsper published and of general circulation in the City of New York, w York, at a redemption price of the principal amount hereof and rued interest to the date of redemption fixed in said notice. If this d be called for redemption in manner aforesaid and payment in h of the redemption price duly made or provided for, interest eon shall cease to be payable from and after the rate of redemption d in the notice of redemption.

The full faith and credit of said City of Asbury Park are hereby evocably pledged to the punctual payment of the principal and erest of this bond according to its terms.

It is hereby certified and recited that all conditions, acts and things uired by the Constitution and statutes of the State of New Jersey exist, to have happened and to have been performed, precedent to in the issuance of this bond exist, have happened, and have been formed, and that the issue of bonds of which this is one, together h all other indebtedness of said City, is within every debt and other it prescribed by the Constitution and statutes of said State.

In Witness Whereof, the City of Asbury Park, in the County of nmouth, has caused this bond to be signed in its name by its Mayor, Treasurer and City Manager under its seal affixed and attested

by its City Clerk, and the coupons hereto annexed to be authenticated by the facsimile signature of said City Treasurer and this bond to be dated the first day of December, 1937.

THE CITY OF ASBURY PARK, NEW JERSEY,

by .....
Mayor.

.....
City Treasurer.

.....
City Manager.

ATTEST:

.....
City Clerk.

(Form of Coupon)

No. $

Unless the bond hereinafter mentioned shall have been called for previous redemption and payment of the redemption price duly made or provided for, the City of Asbury Park, in the County of Monmouth, a municipal corporation of the State of New Jersey, will pay to the bearer on the first day of , 19 , the sum of dollars ($) in lawful money of the United States of America, at the office of the Asbury Park & Ocean Grove Bank, in the City of Asbury Park, New Jersey, or, at the option of the holder, at the office of the Central Hanover Bank & Trust Company, in the Borough of Manhattan, City, County and State of New York, being six months' interest then due on its Refunding Bond, dated December 1, 1937, and bearing No.

.....
City Treasurer.

(Form of Certificate of Registration)

I hereby certify that at the request of the holder of the within bond, for its conversion into a bond registered as to both principal and interest, I have this day cut off and destroyed coupons attached thereto, of the amount and value of dollars ($) each, and that the within bond is hereby converted into a registered bond, with the principal thereof and semi-annual interest thereon payable to , assignee or legal representative.

Dated , 19

City Treasurer.

The within bond has been registered as follows:

Date of Registry	Name of Registered Holder	Registered by

(Form of Certification)

IT IS HEREBY CERTIFIED that the within bond has been recorded by the Municipal Finance Commission of the State of New Jersey in the office of the State Auditor, State House, Trenton, New Jersey, as issued by virtue of a resolution duly certified by said Municipal Finance Commission to the City Council of the City of Asbury Park, in the County of Monmouth, New Jersey.

Secretary (or Authorized Representative)
Municipal Finance Commission.

SECTION 2. The fifth paragraph of the form of bond set forth in the next preceding section of this resolution shall be omitted from any of said Refunding Bonds which may not be issued directly in exchange for the bonds or notes of the City referred to in said paragraph.

SECTION 3. The City Clerk be and he hereby is authorized and directed upon two days' notice mailed to him at the City Offices, Asbury Park, New Jersey, by a representative of the Municipal Finance Commission of the State of New Jersey acting in and for the City, designated by resolution of said Commission (hereinafter referred to as "Commission representative") to cause forms of said Refunding Bonds to be printed, said bonds, in such proportions as said notice may specify, to be of the denominations of $1000, $500 and $100 each, and to present said forms of bonds to the officials hereinafter authorized and directed to execute the same.

SECTION 4. The Mayor, City Treasurer and City Manager are hereby authorized and directed, forthwith upon the presentation of the forms of said bonds to them in accordance with the next preceding section of thi resolution, to execute said bonds in accordance with this resolution and the resolution cited in Section 1 of this resolution, and the City Clerk be and he hereby is authorized and directed thereupon to affix to said bonds the seal of the City and to attest the same by his signature.

SECTION 5. Upon receipt of the approval in writing of the Municipal Finance Commission of the State of New Jersey, acting in and for the City, of the exchange of said Refunding Bonds for the bonds and notes of the City authorized to be funded or refunded by the issuance of said Refunding Bonds, and after execution of said bonds by the proper officials of the City as above directed, the City Treasurer is hereby authorized and directed to present such bonds so executed for execution by the Secretary or other authorized representative of the said Municipal Finance Commission of the form of certification endorsed on said bonds, and thereafter from time to time to exchange, issue and deliver said Refunding Bonds, or part or parts thereof, in accordance with the following sections of this resolution.

SECTION 6. Said Refunding Bonds may be issued and delivered in exchange for an equal principal amount of the bonds and notes of

the City described in Article III of the resolution cited in Section 1 of this resolution (hereinafter referred to as "old bonds"). Upon making any such issuance and delivery of Refunding Bonds, there shall simultaneously be paid by the City such part of the unpaid principal amount of said old bonds so surrendered as may not be a multiple of $100 and a sum in cash computed by adding the total unpaid interest on said old bonds so surrendered accrued to January 1, 1934, to eleven and three-quarters per centum (11.75%) of the principal amount of said old bonds, and deducting from the sum so obtained (1) the amounts of any interest on said old bonds so surrendered accrued since January 1, 1934, theretofore paid, and (2) the amount of any unpaid coupons appurtenant to said old bonds so surrendered not surrendered at or prior to the time of such payment. Upon making any such issuance and delivery of Refunding Bonds, there shall simultaneously be delivered to the City old bonds, in deliverable form, in a principal amount not less than the principal amount of such Refunding Bonds, and, if any suit, action, or proceeding has been had or is pending against the City based on or relative to such old bonds, a stipulation of dismissal or discontinuance of such suit, action or proceeding, and proof of the satisfaction, discharge or vacating of any judgment, writ, decree, order, stay or other process made or entered in such suit, action or proceeding, all in form satisfactory to counsel to the City and counsel to said Municipal Finance Commission of the State of New Jersey.

SECTION 7. The City Treasurer is hereby further authorized and directed forthwith upon the receipt of any old bonds in accordance with the next preceding section of this resolution, to cancel said old bonds by perforating, detaching or otherwise mutilating the signatures thereon and to endorse on each of said old bonds a statement correctly identifying the Refunding Bonds issued in exchange therefor. Said statement shall be in substantially the following form:

"The principal amount of the within obligation was this day funded or refunded by the issuance of Refunding Bond, dated December 1, 1937, No. _____

Dated _____, 193__."

Each such statement so endorsed shall be dated the date of receipt of the old bond and signed or initialed by said City Treasurer and the Secretary or other authorized representative of said Municipal Finance Commission. Said old bonds so cancelled and endorsed shall then be delivered by the City Treasurer to the Secretary of the said Municipal Finance Commission and said Secretary and said City Treasurer shall thereupon make and sign a registry of the same in duplicate and cause one of said duplicate originals to be filed with the said Municipal Finance Commission and the other to be filed and retained among the permanent records of the City.

SECTION 8. Upon the receipt in accordance with Section 6 of this resolution of old bonds of the City in a principal amount satisfactory to the City and the said Municipal Finance Commission, there shall be paid by the City the reasonable expenses of the Protective Committee for Security Holders of the City of Asbury Park, J. S. Rippel, Chairman, and the Committee for Bondholders of the City of Asbury Park, New Jersey, Edwin H. Barker, Chairman, incurred in contributing to the formulation, approval, acceptance and consummation of the refinancing operation of the City resulting in the issuance of said Refunding Bonds. Said payments may include reasonable compensation to the members of such Committees and shall be only in such amounts as may be agreed to by the said Municipal Finance Commission and the City or as may be determined by the New Jersey Supreme Court, or a Justice thereof. Said payments shall be made to either of said Committees only on such conditions as may be likewise agreed to or determined, including (a) receipt by the City of sworn statements, in duplicate, of the several items comprising the total of such expenses and compensation; (b) receipt in accordance with Section 6 of this resolution of all old bonds owned or controlled by said Committee and receipt by the City of assurances satisfactory to the Mayor that all such old bonds so owned or controlled have been so received; and (c) receipt by the City of releases running to the City satisfactory to the Mayor of all claims of said Committee against the City except those embodied or reserved in said Refunding Bonds.

SECTION 9. There shall be paid by the City all costs and expenses incurred by the City in connection with the refinancing operation referred to in Section 8 of this resolution, including the cost of accounting and financial services, printing, publishing, postage, insurance,

ees of escrow agents, the City's expenses for Refunding Counsel and Refunding Agent, and for legal services and disbursements rendered nd made by Hawkins, Delafield & Longfellow, Esqs., of New York ity, in connection with the preparation, examination and approval of roceedings for the issuance of the Refunding Bonds. The foregoing hall include all amounts payable to Ward Kremer, Esq., of Asbury ark, New Jersey, and Harry Cassman, Esq., of Atlantic City, New ersey, for legal services and disbursements made and rendered for he City, including participation in litigation and services in connec- ion with the issuance of the Refunding Bonds. The foregoing pay- nents shall be made only in such amounts as may be agreed to by the aid Municipal Finance Commission and the City or as may be etermined by the New Jersey Supreme Court, or a Justice thereof. here shall also be paid by the City all expenses of the said Municipal inance Commission for account of the City including accounting xpenses, counsel fees and expenses incurred in connection with itigation involving the City.

SECTION 10. All moneys held by the City in any fund, including eserve funds, if any, established pursuant to Section 211 of the Act nder which said Refunding Bonds are to be issued, or otherwise, and ncluding moneys received by the City Treasurer pursuant to Section 2 f Article IX of the resolution cited in Section 1 of this resolution, fter deducting therefrom all moneys received on account of revenues nticipated, or taxes levied for the year 1937 or any subsequent year xcept such as may be otherwise appropriated to the following pur- oses, shall be applied and are hereby appropriated to the several ayments authorized by this resolution. It is hereby determined and eclared that the several payments authorized to be made pursuant to ection 8 and Section 9 of this resolution are payments in lieu of ccrued interest owing by the City made at the request and with the pproval of the creditors of the City, and that accordingly all pay- nents authorized by this resolution are payments of principal of or nterest on the public debt of the City. $225,000 of the moneys ppropriated by this section of this resolution remaining after mak- ng or providing for all payments authorized by any other section of his resolution shall forthwith be paid into the Revolving Fund stablished by the resolution cited by Section 1 of this resolution, nd the balance of such remaining moneys shall forthwith be paid into

the Debt Service Fund established by the resolution cited in Section 1 of this resolution.

SECTION 11. All officials of the City are hereby authorized and directed to execute all such checks, vouchers and other documents and do and perform all such other acts and things as may be necessary, convenient, or desirable to carry out the purposes of this resolution and to enable the officers herein named to carry out and perform the duties herein required of them.

SECTION 12. This resolution shall take effect immediately.

NEW JERSEY SUPREME COURT.

In the Matter of PETITION OF JULIUS S. RIPPEL, ET AL., FOR THE APPROVAL OF A PLAN OF ADJUSTMENT FOR THE CITY OF ASBURY PARK, A MUNICIPAL CORPORATION.	ON PETITION ORDER APPROVING MODIFIED PLAN OF ADJUSTMENT.

This matter being opened to the court by James D. Carpenter of McDermott, Enright and Carpenter, Attorneys for Julius S. Rippel, Russell V. Adams, Frank C. Ferguson, Frank E. Quinby, William K. Paton, J. A. Rippel, W. E. Wetzel and Horace K. Corbin, constituting the Protective Committee for Security Holders of City of Asbury Park, and it appearing that said Committee, on the fourth day of January, 1936, filed on behalf of themselves and all other creditors of the municipality a petition for the approval of a plan of adjustment or composition of the claims of all creditors of the City of Asbury Park, a municipal corporation of the County of Monmouth, which on the seventh day of March, 1935, by an order entered in the Supreme Court of New Jersey, was placed under the control of the Municipal Finance Commission of the State of New Jersey, and is still under said control;

And it further appearing that on the fourth day of January, 1936, this Court took jurisdiction of the subject-matter, ordered said petition filed in the office of the Clerk of the New Jersey Supreme Court, and issued a rule to show cause pursuant to the said petition, providing for a hearing on the said petition returnable February 1, 1936, before the Honorable Joseph B. Perskie, Justice of the New Jersey Supreme Court, in the City of Atlantic City, N. J., and requiring creditors of the City of Asbury Park, and the City of Asbury Park, and the Municipal Finance Commission of the State of New Jersey, to show cause at the said time and place why a plan for the adjustment or composition of claims of all creditors of the City, which plan was submitted with and made a part of the said petition, should not be approved;

And it further appearing that due notice to all creditors of the City of Asbury Park has been published as provided by order of this Court;

And it further appearing that on the return of the said rule to show cause on February 1, 1936, a hearing was held pursuant to the prayer of the said petition, and the City of Asbury Park submitted a plan of adjustment or composition of the claims of all creditors of the said City, which said plan was filed in the said cause;

And it further appearing that on the 3rd day of February, 1937, the City of Asbury Park, by resolution duly adopted by its Mayor and Council, amended its said plan, which said amended plan was filed in said cause;

And it further appearing that depositions were taken and filed in this cause and from time to time hearings were held under the direction of the Court and in the presence of counsel for the petitioners and counsel for other creditors, and of counsel for the Municipal Finance Commission, and that counsel for petitioners proposed modifications of the petitioners' plan of adjustment or composition filed on January 4, 1936, and as a result of said hearings under the direction of this Court, said City of Asbury Park, by resolution, duly adopted a modified plan of adjustment or composition on May 28, 1937, entitled "Amended Refunding Plan of the City of Asbury Park, New Jersey," and caused said modified plan to be filed in said cause;

And it further appearing that the Municipal Finance Commission of the State of New Jersey, by a resolution duly adopted on the 1st day of June, 1937, resolved that said Amended Refunding Plan of the City of Asbury Park adopted by the City on May 28, 1937, is acceptable and will be approved by said Commission if accepted by a sufficient number of bondholders;

And the Court having held hearings on said plans filed in this cause, and having considered the modified plans filed herein and the "Amended Refunding Plan of the City of Asbury Park" adopted May 28, 1937, and having held hearings on said modified plan, and having heard the arguments of counsel for petitioners and other creditors of said City of Asbury Park and of counsel for the Municipal Finance Commission of the State of New Jersey, and of counsel for the City of Asbury Park;

And the Court being satisfied that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted

or composed, and perform its public functions and preserve the value of property subject to taxation, and that the adjustment or composition proposed in the modified plan entitled "Amended Refunding Plan of the City of Asbury, New Jersey," adopted May 28, 1937, is substantially measured by the capacity of the said City of Asbury Park to pay, and that it is in the interest of all the creditors affected thereby, and that it is not detrimental to other creditors of the said City of Asbury Park;

It Is, on the 21st day of July 1, 1937, Ordered that the plan for the adjustment or composition of all claims of creditors of the City of Asbury Park as modified by direction of this Court, entitled "Amended Refunding Plan of the City of Asbury Park," adopted by resolution of the Mayor and Council of the said City on May 28, 1937, in all respects be and the same is hereby authorized and approved, and the adjustment and composition of claims against the said City of Asbury Park as provided for by the said modified plan is hereby authorized and approved, provided creditors of the said City of Asbury Park representing eighty-five per centum in amount of the indebtedness affected thereby approve the said Amended Refunding Plan in writing.

It Is Further Ordered that unless creditors of the City of Asbury Park representing eighty-five per centum of the indebtedness affected thereby approve said modified plan of adjustment or composition in writing on or before January 1, 1938, or on or before such later date to which this Court may upon application extend the time for such written approval, this order shall be void.

On motion of Ward Kremer and Harry Cassman, Attorneys for the City of Asbury Park.

Joseph B. Perskie,
J. S. C.

[fol. 20]

SCHEDULE "B"

NEW JERSEY SUPREME COURT

On Petition, Etc.

In the Matter of Petition of Julius S. Rippel, et al., for the Approval of a Plan of Adjustment for the City of Asbury Park, a municipal corporation

ORDER APPROVING MODIFIED PLAN OF ADJUSTMENT

This matter being opened to the Court by Ward Kremer and Harry Cassman, attorneys for the City of Asbury Park, a municipal corporation in the County of Monmouth; and it appearing that on the 28th day of May, 1937, the Mayor and Council of the City of Asbury Park adopted a modified plan of adjustment or composition with its creditors entitled "Amended Refunding Plan of the City of Asbury Park, New Jersey."

And it further appearing that on the 21st day of July, 1937, an order was entered in this Court in the said proceeding authorizing and approving the said Plan and the adjustment and composition of claims against the City of Asbury Park as provided for by the said modified plan, provided creditors of the City of Asbury Park representing eighty-five per centum in amount of the indebtedness affected thereby approve the said Amended Refunding Plan in writing;

And it further appearing that the said order authorizing and approving the said Plan contained a provision requiring that such written consents should be secured on or before [fol. 21] January 1, 1938, or on or before such later date to which this Court might, upon application, extend the time for such written approval;

And it further appearing that the Municipal Finance Commission of the State of New Jersey, on the 27th day of September, 1937, by resolution approved the said Plan, provided the requisite number of consents be obtained;

And it further appearing that on the 30th day of December, 1937, an order was entered in this cause extending the terms and provisions of the order entered in the said cause July 21, 1937, for a period of thirty days, or until February 1, 1938; and it further appearing that on the 29th day of January, 1938, an order was entered in this cause extending

the terms and provisions of the order entered in the said cause July 21, 1937, and the time for obtaining written consents of creditors of the City of Asbury Park as contained in the order of December 30, 1937, up to and including March 5, 1938; and it further appearing that on the 5th day of March, 1938, an order was entered in this cause extending the terms and provisions of the order entered in the said cause July 21, 1937, and the time for obtaining written consents of creditors of the City of Asbury Park as contained in the order of March 5, 1938, up to and including April 2, 1938; and it further appearing that on the 1st day of April, 1938, an order was entered in this cause extending the terms and provisions of the order entered in the said cause July 21, 1937 and the time for obtaining written consents of creditors of the City of Asbury Park as contained in the order of March 5, 1938, up to and including April 30, 1938;

And it further appearing that on the 22nd day of March, 1938, the Municipal Finance Commission of the State of [fol. 22] New Jersey, being satisfied that the holders of bonds in an amount exceeding eighty-five percentum of the indebtedness affected thereby had consented to the said Refunding Plan herein above referred to, adopted a resolution certifying to the City Council of said City of Asbury Park a resolution of said City appended to the resolution of the said Municipal Finance Commission of the State of New Jersey authorizing the issuance of refunding bonds of said City for the purpose of funding or refunding the certain bonds and notes of said City therein described and theretofore found by the said Commission to be outstanding and unpaid and to be due or to become due; and it further appearing that the said Commission in the said resolution directed that the said resolution thereto appended be forthwith adopted by the proper officials of the said City, namely, the City Council of the City of Asbury Park, and that all acts and things required by said resolution to be done or performed by any official of said City, should be forthwith done or performed by said official at the time and in the manner provided by said resolution;

And it further appearing that on the 23rd day of March, 1938, the City Council of the City of Asbury Park, at a regular meeting duly adopted the said resolution authorizing the issuance of Refunding Bonds of the City of Asbury Park, in the County of Monmouth; and it further appear-

ing that on the 24th day of March, 1938, the said resolution was published in the Asbury Park Press, a newspaper published and circulating in the City of Asbury Park, New Jersey, and that on the 25th day of March, 1938, the said resolution was published in the Progressive Citizen, a news- [fol. 23] paper published and circulating in the said City of Asbury Park;

And it further appearing that in accordance with the statute in such case made and provided the said resolution certified to the City Council by the Municipal Finance Commission on March 22, 1938, and adopted by the City Council of the City of Asbury Park, March 23, 1938, is effective thirty days after the publication thereof; and that the period of thirty days so required by the statute in such case made and provided expired April 23, 1938;

And it further appearing that on the 11th day of April, 1938, the Municipal Finance Commission of the State of New Jersey adopted a resolution approving the form of the bonds to be issued under the said Amended Refunding Plan and certified such resolution to the Mayor and Council of the City of Asbury Park, and that on the 12th day of April, 1938, the Mayor and Council of the City of Asbury Park adopted the resolution approving the form of the said bonds so certified to them by the Municipal Finance Commission of the State of New Jersey;

And it further appearing that creditors in the amount of $9,861,133.26, have consented in writing to the said Amended Refunding Plan; and the court being satisfied that the said creditors so consenting in writing to the said Amended Refunding Plan represent more than eighty-five per centum in amount of the indebtedness affected thereby;

It is, on this 29th day of April, 1938, ordered that this court determines that the City of Asbury Park, a municipal corporation in the County of Monmouth, is unable to pay in full, according to their terms, the claims proposed [fol. 24] to be adjusted or composed under the terms and provisions of the said Amended Refunding Plan and perform its public functions and preserve the value of property in the City of Asbury Park subject to taxation; that the said adjustment or composition is substantially measured by the capacity of the said City of Asbury Park to pay; that it is in the interest of all the creditors affected thereby; that it is not detrimental to other creditors of the municipality; that this court does hereby authorize and approve

such adjustment or composition as embodied in the said Amended Refunding Plan.

It is further ordered that this court shall retain jurisdiction over this proceeding in accordance with the statute in such case made and provided, and for the purpose of determining such matters as are provided under said Amended Refunding Plan for this court's determination.

It is further ordered that the said City of Asbury Park be and it is hereby authorized and empowered to receive further and additional written consents of creditors consenting to the said Amended Refunding Plan up until such time as the entire debt as set forth in the Amended Refunding Plan is refunded.

Joseph B. Perskie, J. S. C.

[fol. 25] In Supreme Court of New Jersey

[Title omitted]

Supplemental Notice of Motion to Strike Complaint—Filed January 31, 1941

To Arthur T. Vanderbilt, Esquire, Attorney for Plaintiffs:

Sir:

Please take notice that on Friday, the 31st day of January, 1941, I shall apply to the New Jersey Supreme Court at the Essex County Court House in the City of Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as the matter can be attended to, for an order striking the complaint in the above entitled cause; and in addition to the reasons set forth in the notice of motion in this matter dated December 26, 1940, the following reasons for striking the said complaint will be urged:

4. The complaint does not set forth a legal cause of action.

[fol. 26] 5. The complaint does not aver that plaintiffs have obtained permission of the New Jersey Supreme Court to institute the said cause of action.

Ward Kremer, Attorney for Defendant.

Dated—January 28, 1941.

Service of a copy of the within Supplemental Notice of Motion is hereby acknowledged this 29th day of January, 1941.

Arthur T. Vanderbilt, Attorney for Plaintiffs.

[fol. 27] IN SUPREME COURT OF NEW JERSEY

[Title omitted]

AFFIDAVIT OF WALTER HAIGHT—Filed January 31, 1941

STATE OF NEW JERSEY,
County of Monmouth, ss:

Walter Haight, of full age, being duly sworn according to law upon his oath, deposes and says:

I am the auditor and comptroller of the City of Asbury Park and I am familiar with the provisions of the Refunding Plan of the City of Asbury Park, which was approved by the New Jersey Supreme Court by an order dated July 1, 1937, which order provided that the said Plan should become operative provided creditors of the said city, representing eighty-five per centum in amount of the indebtedness affected thereby, should approve the said Refunding Plan in writing. On April 29, 1938, creditors of the City of Asbury Park representing in excess of eighty-five per centum in amount of the indebtedness affected thereby, having approved the said Refunding Plan in writing, an order [fol. 28] was entered in the New Jersey Supreme Court authorizing and approving the adjustment or composition embodied in the said Refunding Plan.

All of the bonds the subject of the above entitled cause, and referred to in the complaint herein, were included in the said Refunding Plan as reference thereto will show and the claims of the plaintiffs were included in the said Refunding Plan.

The bonds referred to in the First Count of the complaint were included in the said Plan and were embraced within the following item appearing on page fifteen (15) of the said Refunding Plan:

Issue	Date	Maturity	Total Issue
Consolidated Improvement Casino.	4-1-30	4-1-34	$460,000.00

The bonds referred to in the Second Count of the complaint were included in the said Plan and were embraced within the item on page fifteen (15) thereof as follows:

Issue	Date	Maturity	Total Issue
Consolidated Improvement Casino	6-1-29	12-1-33	$377,000.00

The bonds referred to in the Third Count of the complaint were included in the said Refunding Plan as reference to said page fifteen (15) will show and were included in the following item:

Issue	Date	Maturity	Total Issue
Consolidated Improvement Casino	6-1-29	12-1-34	$980,000.00

The bonds referred to in the Fourth Count of the complaint were included in the Refunding Plan as reference [fol. 29] to page fifteen (15) will show and were included in the following item:

Issue	Date	Maturity	Total Issue
Consolidated Improvement Casino	6-1-29	6-1-35	$1,000,000.00

All of the bonds the subject of the said complaint were included in the said Refunding Plan and provisions were entered to refund the said bonds as provided therein.

The said Refunding Plan (Article 2, page 4) further provided for the payment of all delinquent interest and provision was made for the payment of delinquent interest on the bonds represented, included in said Plan and owned by the plaintiffs or either of them, as reference thereto will show.

Walter P. Haight.

Sworn and subscribed to before me this 28 day of January, 1941. Mabel M. Haight, A Notary Public of N.J. (Seal.)

[fol. 30] In Supreme Court of New Jersey

[Title omitted]

Answering Affidavit of Moses W. Faitoute—Filed January 31, 1941

State of New Jersey,
County of Essex, ss:

Moses W. Faitoute, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the plaintiffs in the above entitled cause and am President of the Faitoute Iron & Steel Company, which is the other plaintiff. I am duly authorized by the said corporation to make this affidavit on its behalf.

2. Neither Faitoute Iron & Steel Company nor myself have ever approved or consented to, in writing or otherwise, the refunding plan of the City of Asbury Park attached to and made a part of the affidavit of Milford G. Farley in this cause sworn to December 27, 1940, and referred to in the affidavit of Walter Haight in this cause sworn to January 28, 1941. Neither Faitoute Iron & Steel Company [fol. 31] nor myself appeared nor were we represented by agent, attorney or otherwise in any of the proceedings in the New Jersey Supreme Court referred to in said affidavits.

3. I am informed and verily believe that the refunding plan of the City of Asbury Park and the proceedings under and in connection therewith and the statute under which said proceedings were had, all as referred to in said affidavits and the notice of motion to strike the complaint herein, are not binding upon the plaintiffs and constitute no legal defense or bar to this suit and no basis in law or fact for the striking of the complaint herein because:

(a) Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937), being the statute referred to and relied on in the said notice of motion and affidavits, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States.

(b) Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937), being the statute referred

to and relied on in the said notice of motion and affidavits, is unconstitutional and void in that it is a statute impairing the obligation of contracts and deprives a party of a remedy for enforcing a contract which existed when the contract was made in violation of Article IV, Section VII, paragraph 3 of the Constitution of New Jersey.

(c) Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937), being the statute referred [fol. 32] to and relied on in the said notice of motion and affidavits, is unconstitutional and void in that it deprives plaintiffs of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) Article 7 of Title 27 of Chapter 25 of the Revised Statutes of New Jersey (1937), being the statute referred to and relied on in the said notice of motion and affidavits, is unconstitutional and void in that it denies plaintiffs the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

(e) Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937), being the statute referred to and relied on in the said notice of motion and affidavits, was rendered nugatory and inoperative and was superseded by the enactment by the Congress of the United States of an amendment to the Federal Bankruptcy Act (Act, July 1, 1898 c. 54) entitled "Composition of Indebtedness of Local Taxing Agencies" approved by Act August 16, 1937, c. 657, 50 Stat. 654 and further amended by Act June 22, 1938, c. 575, 52 Stat. 939; Act March 4, 1940, c. 41, 54 Stat. 44; and Act June 28, 1940, c. 438, 54 Stat. 667, and by reason whereof all proceedings had or purported to be had with respect to the City of Asbury Park and the obligations thereof in the New Jersey Supreme Court, as referred to in the affidavits filed herein, were rendered void and of no [fol. 33] effect after the enactment of the amendment first above referred to.

(f) Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey (1937), being the statute referred to and relied on in the said notice of motion and affidavits, was rendered nugatory and inoperative and was super-

seded by the enactment by the Congress of the United States of an amendment to the Federal Bankruptcy Act (Act, July 1, 1898 c. 54) entitled "Provisions for the Emergency Temporary Aid of Public Debtors", approved by Act May 24, 1934, c. 345, 48 Stat. 798, and further amended by Act April 10, 1936, c. 186, 49 Stat. 1198, and Act April 11, 1936, c. 210, 49 Stat. 1203, and by reason whereof all proceedings had or purported to be had with respect to the City of Asbury Park and the obligations thereof, in the New Jersey Supreme Court, as referred to in the affidavits filed herein, were rendered void and of no effect after the enactment of the amendment first above referred to.

Moses W. Faitoute.

Sworn and subscribed to before me this 30th day of January, 1941. L. M. Stickel, A Notary Public of New Jersey. (Seal.)

[fol. 34] In Supreme Court of New Jersey, Essex County

Faitoute Iron & Steel Company, a corporation, and Moses W. Faitoute, Plaintiffs,

vs.

City of Asbury Park, a municipal corporation, Defendant

Arthur T. Vanderbilt, Attorney of Plaintiffs;
Ward Kremer, Attorney for Defendant.

Opinion—Filed March 28, 1941

Smith, Joseph L., *S. C. C.*

This comes on a motion of the defendant to strike the complaint filed herein as setting forth no legal cause of action. The plaintiffs' suit is to recover on bonds and interest coupons issued by the defendant and held by the plaintiffs. The grounds set forth in the motion to strike the complaint are that the complaint does not set forth a legal cause of action; that the complaint does not aver that the plaintiffs have obtained the permission of the New Jersey Supreme Court to institute the present suit; that the defendant has in operation a refunding plan controlling the plain-

tiffs' claim; that the plaintiffs are controlled by the terms and provisions of N. J. S. A. 52:27-34, *et seq.*; and that [fol. 35] the plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the present suit.

The procedural propriety of the motion is questionable in view of the fact that the complaint, on its face, without the qualification of extraneous matters, does set forth a cause of action, and the grounds stated in the motion would have been stated more properly by way of an answer. However, all the relevant facts are admitted by both parties and concededly there are no issues of facts to be determined, and solely a question of law is left for determination. Under these circumstances, the court will consider the motion on the merits rather than on procedural grounds.

The defendant concedes the issuance of bonds now held by the plaintiffs; it shows, however, that on or about March 7th, 1935, it, the City of Asbury Park, was placed under the control of a Municipal Finance Commission, pursuant to N. J. S. A. 52:27-1, *et seq.*; thereafter, a plan for refunding of the bonded indebtedness of the city was filed with the New Jersey Supreme Court, pursuant to N. J. S. A. 52:27-34, *et seq.*, whereupon the Supreme Court assumed jurisdiction over the proceedings.

In due course the court approved the refunding plan, subject to the approval of the plan by 85% or more, in amount of the indebtedness affected by the plan. Subsequently, the necessary percentage of consents was obtained and the plan was put into operation on June 15th, 1938. The contention of the defendant is that the claim or interests of the plaintiffs, are governed and controlled by the said plan. Justice Perskie, in his order approving the modified plan of adjustment, under date of April 29th, 1938, states that:

[fol. 36] "It (referring to the plan) is not detrimental to other creditors of the municipality."

The said order also provides that the Supreme Court shall retain jurisdiction over the proceedings, in accordance with the statutes and for the purpose of determining such matters as are provided under the said amended refunding plan for the court's determination.

The plaintiffs contend that the statute in question, under which the proceedings in the Supreme Court were held, and

upon which would be based the defendant's defense, are unconstitutional.

Under the circumstances stated, it is not necessary to determine the constitutionality of N. J. S. A. 52:27-1,-34, *et seq.*, insofar as the provisions thereof, in abrogation of contractual rights of plaintiffs, are concerned. The statute in question, 52:27-38, provides that the Supreme Court shall retain jurisdiction over the proceedings even after the entry of the order approving the adjustment; that thereafter no creditor shall bring action without the permission of the Supreme Court. In compliance with this statute, our Supreme Court, under the order of Mr. Justice Perskie, has accepted and retained jurisdiction over the proceedings, even as to subsequent actions,

"In accordance with the statute in such cases made and provided—".

In the face of our Supreme Court having assumed jurisdiction over the matter and having expressly retained such jurisdiction for further proceedings, this court will require compliance with the provisions of that order, and with the provisions of the statute requiring that the permission of [fol. 37] the Supreme Court be obtained prior to the bringing of such an action. Such permission concededly lacking in the case, the motion to strike the complaint will be granted; an order will be entered accordingly.

(Signed) Joseph L. Smith, Supreme Court Commissioner.

March 27th, 1941.

IN SUPREME COURT OF NEW JERSEY

[Title omitted]

ORDER DISMISSING COMPLAINT—Filed April 5, 1941

This matter being opened to the Court by Ward Kremer, attorney for the defendant; and it appearing that a complaint was filed by the plaintiffs in the above entitled cause, and a motion having been made to strike the complaint; and the matter having come on for argument before this Court on the 31st day of January, 1941; and the Court

[fol. 38] having heard the arguments of counsel, and having considered the matter, and being satisfied that the said complaint should be stricken:

It is on this 4th day of April, 1941, ordered that the complaint filed by the plaintiffs in the above entitled cause be and the same is hereby struck out, and that the said suit be and the same is hereby dismissed with costs.

Joseph L. Smith, Circuit Court Judge and Supreme Court Commissioner.

Entered on Motion of

Ward Kremer, Attorney for Defendant.

I hereby consent to the within Order as to form.

Arthur T. Vanderbilt, Attorney for Plaintiffs.

[fol. 39] In Supreme Court of New Jersey

[Title omitted]

Rule for Final Judgment—Filed April 9, 1941

This matter being open to the Court by Ward Kremer, attorney for the defendant; and it appearing that a complaint was filed by the plaintiffs in the above entitled cause, and that a motion was made to strike the complaint; and it further appearing that on the 4th day of April, 1941 an order was entered in the cause striking out the said complaint and dismissing the said suit;

It is, therefore, on this 9th day of April, 1941, ordered that judgment final be entered in favor of the defendant and against the plaintiffs in the above entitled cause, with costs.

On Motion of

Ward Kremer, Attorney for Defendant.

Entered, April 9, 1941.

I hereby consent to the within rule as to form.

Arthur T. Vanderbilt, Attorney for Plaintiffs.

[fol. 40] IN SUPREME COURT OF NEW JERSEY

Action at Law

Judgment for Defendant on Striking Out Plaintiffs' Complaint

Ward Kremer, Attorney.

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, Plaintiffs,

vs.

CITY OF ASBURY PARK, a Municipal Corporation, Defendant

JUDGMENT—Entered April 9, 1941

Afterwards upon proceedings duly had according to the Statute and the rules of Court, the Court ordered said complaint stricken out and the suit dismissed with costs.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed, and that the defendant City of Asbury Park, a municipal corporation, do recover of the said plaintiffs Faitoute Iron & Steel Company a corporation and Moses W. Faitoute, its costs, which have been taxed at the sum of Fifty-two dollars.

Costs $52.00

Judgment entered and signed April 9, 1941.

Thomas J. Brogan, Chief Justice.

[fol. 41] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY, MAY TERM, 1941

No. 27

FAITOUTE IRON & STEEL COMPANY, a Corporation and MOSES W. FAITOUTE, Appellants,

v.

CITY OF ASBURY PARK, a Municipal Corporation, Respondent

Submitted May 1941. Decided Sep. 19, 1941

On appeal from Supreme Court

For appellant, Arthur T. Vanderbilt, John A. Ackerman, G. Dixon Speakman.

For respondent, Ward Kremer.

OPINION—Filed September 19, 1941

The opinion of the court was delivered by

BODINE, J.:

The appeal is from an order striking the complaint. It contained four counts. The corporation and the individual plaintiffs are both residents of this state and are the owners of certain bonds issued by the defendant municipality which are in default and have not been paid as agreed. The city moved to strike the complaint, in that the city had in operation an approved refunding plan and the payment of the bonds in suit was controlled thereby pursuant to N. J. S. A. 52:27-1, et seq. and N. J. S. A. 52:27-34 et seq., and lastly that permission of the New Jersey Supreme Court, a statutory requisite, to the institution of the present proceeding had not been obtained.

It appears that on March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission pursuant to the provisions of N. J. S. A. 52:27-1 et seq. The city was, at that time, in default in the payment of interest on its bonded indebtedness. On February 1, 1936, a plan for the refunding of its bonded debt was filed in the Supreme Court pursuant to the terms and provisions of N. J. S. A. 52:27-34 et seq. and the court took jurisdiction of the proceedings. The plan provided for [fol. 42] the refunding of $10,750,000 of outstanding bonds and included among the bonds to be refunded were the bonds mentioned in the complaint. The plan, as amended, was approved by an order dated July 21, 1937. The order provided that the plan should, before becoming effective, be approved by creditors representing eighty-five per centum in amount of the indebtedness affected and approval to be evidenced in writing, in accordance with the terms and provisions of the statute in such case made and provided (N. J. S. A. 52:27-38).

On September 28, 1937, the Municipal Finance Commission of this State, by resolution, approved the amended plan, providing the requisite number of creditors should consent thereto in accordance with the statute.

On April 29, 1938, creditors representing in excess of eighty-five per centum in amount of the indebtedness affected consented to the plan, so that an order was then entered in the court approving the refunding plan and ap-

proving the adjustment or composition therein contained in accordance with the statute (N. J. S. A. 52:27-36).

The refunding plan was put into operation June 15, 1938, and the bondholders, who had consented in writing to the terms and provisions of the refunding plan, exchanged their outstanding bonds for new bonds issued to them in accordance with the terms of the plan.

The plan seems to have been fair and in all respects equitable.

The first question for us to determine is: Could the court strike the complaint which alleged a perfectly good cause of action and, which, without proof of the refunding plan, would have stood?

The adoption of the refunding plan, under the circumstances of this case, was or was not a defense which barred the action. Such a defense, since it goes to the whole [fol. 43] action, should have been raised by answer. The complaint, as before noted, did not fail to state a cause of action and it was not sho-n. The statute provides when a complaint may be struck (N. J. S. A. 2:27-125). A motion to strike, like a common law demurrer, admits every fact well pleaded; so it is a curious departure to strike a complaint because of allegations contained in affidavits filed by the moving party. The proper practice is suggested in the following cases: Gross v. New York C. R. R. Company, 99 N. J. L. 414; Brooks v. Metropolitan Life Insurance Company, 70 Id. 36; Fidelity Union Trust Company v. Pavlovsky, 17 N. J. Misc. 10; Koewing v. West Orange, 89 N. J. L. 539; Tanis v. Passaic County, 123 Id. 485; Lully v. National Surety Company, 106 Id. 81, 83.

The point is also made that the affidavits used state opinions and not fact. This, of course, is ordinarily a fatal defect. The real question was the constitutionality of the refunding act. The material facts in the case are not in dispute. We will treat the pleadings as though amended and consider the merits since the question presented is one which should be speedily determined. If there had been a disputed fact issue the court, in the absence of consent, could not have passed upon the merits. Standard Radio Corporation v. Triangle Radio &c., 125 N. J. L. 131.

This brings us to the constitutional question. Appellant argues that the composition statute (N. J. S. A. 52:27-34, 39)

is unconstitutional since it impairs the obligation of contract. We have held its predecessor not faulty. Hourigan v. North Bergen Township, 113 N. J. L. 143.

Mr. Justice Heher, in that case, said of the statute: "The act confers upon the finance commission, in respect of the municipality's financial affairs, powers somewhat akin to those exercised by receivers of insolvent corporations. * * * Its primary purpose is to keep intact the corporate structure, and to continue municipal function until re-[fol. 44] habilitation can be effected. This is, of necessity, a proper legislative function, and the rights of creditors, in such a situation, are secondary. It is a proper exercise of police power. It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public though contracts entered into between individuals may thereby be affected." Hourigan v. North Bergen Township, 113 N. J. L. 149.

N. J. S. A. 52:27-35 is as follows: "It is declared that this chapter is intended by the legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations and the resulting impairment of public credit, requiring intervention by the state to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers, and that this chapter is remedial in nature and the powers hereby granted shall be liberally construed."

At the time of the adoption of the plan, pursuant to the statute, the credit of Asbury Park had suffered greatly. The bonds issued to the plaintiffs long before the enactment of the statute had little value. The new bonds issued under the plan are not in default and there is a very substantial market for them.

It is argued that a municipal bankruptcy act is within the exclusive jurisdiction of Congress. United States v. Bekins, 304 U. S. 27. The statute there approved was passed in 1937 (50 Stat. 654). Our statutes were of 1931-1933 origin.

The court proceedings thereunder were initiated February 1, 1936. No obligation of contract was discharged [fol. 45] but provision was made, under the supervision

of competent judicial authority, for the collection of the debts owed by a municipality then in default by a fair means. How little the bondholder's right is changed is illustrated by Lyon v. Elizabeth, 43 N. J. L. 158; Piscataway Two. v. First National Bank of Dunellen, 111 Id. 412; Vanderpool v. Mount Ephriam, Id. 423.

The holder of a defaulted municipal bond, before the statute, could take judgment and enforce payment only by mandamus, a discretionary writ. Under the plan in question, a bondholder secures a new remedy for an existing right—a remedy uniform to all in the same class and well within the legislative power. If we assume the act had not been passed and all bondholders had secured judgments, they would then have had to go to the Supreme Court for writs of mandamus to secure payment. The Court would, no doubt, have provided some means for enforcing the judgments so as to do no irreparable public injury. What more appropriate than a legislative plan to secure payment under the supervision of a commission and the court. The plan is fair alike to the bondholders and the citizens dependent upon good government. Of course, priorities cannot be destroyed under such a plan. State ex rel. Phelps v. Fort Lee, 14 N. J. Misc. 895, affirmed 191 Atl. Rep. 836.

Lastly, we cannot regard the federal enactment as one that puts to sleep the state power to provide an equitable means for the collection of municipal obligations, or as invalidating a prior proceeding taken under a state statute in good faith. It is not to be supposed that the sovereign may not provide a means which insures payment of defaulted municipal obligations in an orderly manner.

The judgment is affirmed with costs.

[File endorsement omitted.]

[fol. 46] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

Action at Law

On Appeal from the New Jersey Supreme Court

FAITOUTE IRON & STEEL COMPANY, a corporation, and MOSES W. FAITOUTE, Plaintiffs-Appellants,

vs.

CITY OF ASBURY PARK, a municipal corporation, Defendant-Respondent

ORDER OF AFFIRMANCE AND REMITTITUR TO NEW JERSEY SUPREME COURT—Filed October 7, 1941

This cause having been duly argued at the May Term 1941 of this Court by Arthur T. Vanderbilt, John A. Ackerman, and G. Dixon Speakman, of counsel for the plaintiffs-appellants, and by Ward Kremer, of counsel for the defendant-respondent, and the Court having considered the same and finding no error in the record and proceedings in the Supreme Court:

It is, thereupon, on this 19th day of September, in the year of our Lord one thousand nine hundred and forty-one, Ordered and Adjudged that the judgment of the Supreme Court removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of Ward Kremer, Of Counsel for the Defendant-Respondent.

[fol. 46a] [File endorsement omitted.]

[fol. 47] IN THE SUPREME COURT OF THE UNITED STATES

FAITOUTE IRON & STEEL COMPANY, a corporation, and THE HOWARD SAVINGS INSTITUTION, a corporation of the State of New Jersey, Florence W. Faitoute, Claire Faitoute White, and William G. Carter, Executors of the Estate of Moses W. Faitoute, Plaintiffs-Appellants,

vs.

CITY OF ASBURY PARK, a municipal corporation, Defendant-Respondent

PETITION FOR APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY TO THE SUPREME COURT OF THE UNITED STATES—Filed December 20, 1941

Considering themselves aggrieved by the final decision and judgment of the Court of Errors and Appeals of the State of New Jersey in the above entitled cause, petitioners, Faitoute Iron & Steel Company, a corporation of the State of New Jersey, and The Howard Savings Institution, a corporation of the State of New Jersey, Florence W. Faitoute, Claire Faitoute White and William G. Carter, the Executors of the Estate of Moses W. Faitoute, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of bond thereon, and to that end respectfully show:

1. Your petitioners are the plaintiffs-appellants in the above entitled cause. The petitioners, The Howard Savings Institution, a corporation of the State of New Jersey, Florence W. Faitoute, Claire Faitoute White and William G. Carter are the executors of the Estate of Moses W. Faitoute, whose death occurred after the institution of this suit, and said petitioners have been substituted as party plaintiffs in his stead.

[fol. 48] 2. On the 14th day of December, 1940, your petitioner, Faitoute Iron & Steel Company, and said Moses W. Faitoute filed a complaint in the New Jersey Supreme Court seeking to recover on certain overdue bonds and coupons owned and held by them which said bonds and coupons were issued by and obligations of the respondent, the City of Asbury Park, a municipal corporation organized and existing under and by virtue of the laws of the State of New Jersey. Said respondent defended said suit on the

ground that it had in operation a plan of composition adopted in accordance with Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising sections 52:27-34 through 52:27-39, and that by virtue of said plan and said statute, appellants' suit to recover on said bonds and coupons could not be maintained. Judgment was rendered therein by said New Jersey Supreme Court in favor of said respondent.

3. An appeal was taken from said judgment to the Court of Errors and Appeals of the State of New Jersey, the court of last resort in all causes in the State of New Jersey, and said judgment was affirmed by said Court of Errors and Appeals on the 19th day of September, 1941.

4. There is error in the final judgment and record of the proceedings in this cause in the said Court of Errors and Appeals of the State of New Jersey whereby your petitioners are aggrieved in that in the decision and judgment of the said Court there is drawn in question the validity of a statute of the State of New Jersey, namely Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising sections 52:27-34 through 52:27-39, on the ground of its being repugnant to and in contravention of the Constitution of the United States in that said statute, [fol. 49] as construed and applied to permit the compulsory composition of the debts of a municipal corporation, which debts were incurred and created before the enactment of the statute, impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States, and deprives your petitioners of property without due process of law and denies your petitioners the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States, and that the decision and judgment of the said Court was in favor of the validity of said statute.

5. Therefore, in accordance with Section 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioners respectfully show this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

Wherefore, petitioners pray for the allowance of an appeal from the aforesaid final judgment of the Court of Errors and Appeals of the State of New Jersey to the Supreme Court of the United States in order that the said decision and judgment of the Court of Errors and Appeals of the State of New Jersey may be examined and reversed, and further pray that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Court of Errors and Appeals of the State of New Jersey, may be sent to the Supreme Court of the United States, as provided by law. The errors upon which [fol. 50] petitioners claim to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the Assignment of Errors filed herewith.

Arthur T. Vanderbilt, Attorney for Petitioners.

Dated: December 15, 1941.

[fol. 50a] Order Denying Petition for Appeal

The within petition for appeal is hereby denied because of lack of jurisdiction this 15 day of December, 1941.

Luther A. Campbell, Chancellor of the State of New Jersey and President Judge of the Court of Errors and Appeals in the Last Resort in all Causes.

[File endorsement omitted.]

[fol. 51] In Supreme Court of the United States

[Title omitted]

Assignment of Errors—Filed December 20, 1941

The said Faitoute Iron & Steel Company, a corporation, and The Howard Savings Institution, a corporation of the State of New Jersey, Florence W. Faitoute, Claire Faitoute White and William G. Carter, Executors of the Estate of Moses W. Faitoute, assign the following errors in the record and proceedings in the said cause:

1. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the provisions of Article 7 of Chapter 27 of Title 52 of the Re-

vised Statutes of New Jersey, comprising Sections 52:27-34 through 52:27-39, and the adoption of a plan of composition by respondent in accordance therewith operated to prevent suit to enforce recovery on petitioners' bonds and coupons is illegal and erroneous because said statute was enacted, and said plan was adopted, after the issuance of said bonds and coupons and said petitioners did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied by the Court [fol. 52] of Errors and Appeals of the State of New Jersey is unconstitutional in that it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States.

2. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the provisions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 through 52:27-39, and the adoption of a plan of composition by respondent in accordance therewith operated to prevent suit to enforce recovery on petitioners' bonds and coupons is illegal and erroneous because said statute was enacted, and said plan was adopted, after the issuance of said bonds and coupons and said petitioners did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied deprives petitioners of property without due process of law, denies petitioners the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said judgment of the Court of Errors and Appeals of the State of New Jersey dated the 19th day of September, 1941, in the above entitled cause affirming the judgment of the New Jersey Supreme Court may be reversed, set aside and for nothing holden.

Dated: December 15, 1941.

Arthur T. Vanderbilt, Attorney for Appellants.

[fol. 52a] [File endorsement omitted.]

[fol. 53] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 20, 1941

The plaintiffs-appellants in the above entitled cause having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Court of Errors and Appeals of the State of New Jersey on the 19th day of September, 1941, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is Ordered that, an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Errors and Appeals of the State of New Jersey in the above entitled cause as provided by law, and it is further Ordered that the Clerk of the Court of Errors and Appeals of the State of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of [fol. 54] the United States, so that he shall have the same in said Court within 40 days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of Two hundred dollars ($200).

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

Dated: December 16, 1941.

[fol. 54a] [File endorsement omitted.]

[fol. 55] Citation in usual form showing service on Ward Kremer omitted in printing.

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF DEPOSIT OF SECURITY FOR COSTS—Filed December 24, 1941

I, Charles Elmore Cropley, Clerk of the Supreme Court of the United States, do hereby certify that on this Nine-

teenth day of December, 1941, there was deposited with me by the plaintiffs-appellants in the above entitled cause the sum of $200 as security for costs, being the amount fixed in the order allowing the appeal in the above cause dated December 16, 1941.

Charles Elmore Cropley, Clerk of the Supreme Court of the United States. By E. P. Cullinan, Assistant.

[fol. 56a] [File endorsement omitted.]

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO RECORD—Filed January 9, 1942

It is hereby stipulated by and between the respective parties hereto by their attorneys that the Clerk of the New Jersey Court of Errors and Appeals prepare a transcript on appeal herein including the following portions of the record to wit:

1. Summons.
2. Complaint.
3. Affidavit of Merits.
4. Notice of Motion
5. Affidavit of Milford G. Farley
   (A) Schedule A
   (B) Schedule B.
6. Supplemental Notice of Motion.
7. Affidavit of Walter Haight.
8. Answering affidavit of Moses W. Faitoute.
9. Opinion of Supreme Court Commissioner.
10. Order Dismissing Complaint.
11. Rule for Final Judgment.
12. Judgment.

[fol. 58] 13. Notice and Grounds of Appeal.

14. Opinion of New Jersey Court of Errors and Appeals.
15. Order of Affirmance and Remittitur to Supreme Court.
16. Petition for Appeal to the Supreme Court of the United States.
17. Assignment of Errors.
18. Statement of Basis of Jurisdiction.
19. Order Allowing Appeal.
20. Citation.

21. Proof of Service.
22. Statement Referring to Rule 12, paragraph 3, and Proof of Service thereon.
23. Certificate of Deposit of Security for Costs.

Arthur T. Vanderbilt, Counsel for Plaintiffs-Appellants. Ward Kremer, Counsel for Defendant-Respondent.

[fol. 58a] [File endorsement omitted.]

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] In Supreme Court of the United States

Statement of Points and Designation of Record—Filed January 27, 1942

Come now the appellants and adopt their assignments of error as their statement of points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of the case.

Dated: January 21, 1942.

Arthur T. Vanderbilt, Counsel for Appellants.

[fol. 60a] [File endorsement omitted.]

[fol. 61] Supreme Court of the United States

Order Noting Probable Jurisdiction—February 9, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 46,224 New Jersey, Court of Errors and Appeals, Term No. 896. Faitoute Iron & Steel Company, The Howard Savings Institution, Florence W. Faitoute, et al., Appellants, vs. City of Asbury Park, a Municipal Corporation of the State of New Jersey. Filed January 23, 1942. Term No. 896 O. T. 1941.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 896

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, ET AL.,

Appellants,

vs.

CITY OF ASBURY PARK, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

ARTHUR T. VANDERBILT,
Counsel for Appellants.

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STATUTES CITED.

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Fourteenth Amendment 5, 6, 7

Revised Statutes of New Jersey, Title 52, Chapter 27, Article 7, Sections 52:27-34 through 52:27-39 (Original enacted by Chapter 331 of the Laws of New Jersey of 1933, as a supplement to the Municipal Finance Commission Act, Chapter 340 of the Laws of New Jersey of 1931, as amended, now Chapter 27 of Title 52 of the Revised Statute of New Jersey 2, 3

United States Code, Title 28, Sec. 344a (Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937) 1, 2

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 896

FAITOUTE IRON & STEEL COMPANY, A CORPORATION, AND THE HOWARD SAVINGS INSTITUTION, A CORPORATION OF THE STATE OF NEW JERSEY; FLORENCE W. FAITOUTE, CLAIRE FAITOUTE WHITE, AND WILLIAM G. CARTER, EXECUTORS OF THE ESTATE OF MOSES W. FAITOUTE,

Plaintiffs-Appellants,

vs.

CITY OF ASBURY PARK, A MUNICIPAL CORPORATION,

Defendant-Respondent.

STATEMENT OF BASIS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Appellants contend that the basis upon which the Supreme Court of the United States has jurisdiction to review on appeal the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause is:

1. The statutory provisions sustaining the jurisdiction are found in Title 28, U. S. Code, Section 344(a), pp. 205,

206 (Act of February 13, 1925, c. 229, Section 1, 43 Stat. 937):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

and in Title 28 U. S. Code, Sections 861(a) and 861(b), Act of January 31, 1928, c. 14, Section 1, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466:

> "861 (a). Writ of error abolished; substitution of appeal. The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

> "861 (b). Statutes governing writs of error to apply to appeals. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which section 861a of this title substitutes for a writ of error."

2. The statute of the State of New Jersey, the validity of which is involved, is Article 7 of Chapter 27 of Title 52 of

the Revised Statutes of New Jersey, which Article comprises Sections 52:27-34 through 52:27-39. The Article is entitled "Adjustment or Composition of Claims of Creditors" and was originally enacted on June 27, 1933, Chapter 331 of the Laws of New Jersey of 1933, as a supplement to the Municipal Finance Commission Act, Chapter 340 of Laws of New Jersey of 1931, as amended, now Chapter 27 of Title 52 of the Revised Statutes of New Jersey. The statute provides:

> "52:27-34. *Petition by creditors; plan of adjustment or composition; parties; notices.* Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.
>
> "The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.
>
> "52:27-35. *Allegations in petition.* In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

"52:27-36. *Approval by supreme court justice of plan of adjustment or composition: findings.* In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby, and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

"52:27-37. *Approved plan binding on all creditors; substituted obligations.* The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

"52:27-38. *Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted.* After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

"In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

"52:27-39. *Reduction in principal of outstanding notes or bonds prohibited.* Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality."

The question raised before the Court of Errors and Appeals of the State of New Jersey and before the New Jersey Supreme Court was the validity of the statute above quoted on the ground that said statute as construed and applied was repugnant to Article I, Section 10 of the Constitution of the United States and to the Fourteenth Amendment thereto. Appellants contend that the judgment and decision of the Court of Errors and Appeals of the State of New Jersey is in favor of the validity of said statute as construed and applied, and therefore that said judgment and decision may be reviewed by the Supreme Court of the United States on appeal.

3. The judgment of the Court of Errors and Appeals of the State of New Jersey here sought to be reviewed was entered on September 19, 1941, and the date upon which the application for the appeal was presented was December 15, 1941.

4. The question involved in this cause is whether the New Jersey statute above quoted, as construed and applied by

the courts of that state to permit a compulsory adjustment and composition of the debts of a municipal corporation, which debts were incurred and created before the enactment of the statute, is unconstitutional as applied to a dissenting creditor because it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States.

This question was raised in the pleadings in the New Jersey Supreme Court, the court of first instance, and was also raised on appeal to the Court of Errors and Appeals of the State of New Jersey.

Appellants' complaint in the New Jersey Supreme Court sought to recover on certain over-due bonds and coupons issued by the respondent, the City of Asbury Park, a municipal corporation organized and existing under the laws of the State of New Jersey. Said bonds were issued by said respondent in the years 1929 and 1930, long before the enactment of the statute here involved, bore interest at the rate of five and three-quarters per cent or six per cent per annum, and were due and payable in the years 1933, 1934 or 1935.

Respondent's answering pleading set up as a defense to appellants' claim that, pursuant to and in accordance with the terms of the New Jersey statute above quoted, a refunding plan was adopted by respondent on April 29, 1938, and put into operation on June 15, 1938. Under the terms of said plan of adjustment and composition so adopted, respondent agreed to pay all interest on outstanding bonds at the contract rate up to and including December 31, 1933, to pay all interest for the years 1934, 1935, 1936 and until December 1, 1937, at the rate of three per cent per annum, and to issue new bonds to bondholders in exchange for their outsfanding bonds, which new bonds were to be dated

December 1, 1937, were to mature in 1966, and were to bear interest at the rate of four per cent per annum. It was alleged that as a result of the adoption of said plan, the provisions of the statute here involved operated to make said plan binding upon all creditors of the respondent, including appellants, prevented suit to enforce any rights other than those given by said plan, and prohibited such suit except with the permission of the New Jersey Supreme Court obtained in accordance with Section 52:27-38 of the statute, which permission had not been secured by appellants in this cause.

In reply to said answering pleading, appellants alleged that they had never approved or consented to said refunding plan and that they had never appeared or been represented in any of the proceedings in the New Jersey Supreme Court in connection with its adoption. Said appellants further alleged that said plan was not binding upon them and constituted no defense to their suit because the statute under which said plan was adopted was unconstitutional and void as to appellants, among other reasons, because it was a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and because it deprived appellants of their property without due process of law, denied appellants the equal protection of the laws and abridged the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

The question thus raised was argued before the New Jersey Supreme Court which rendered judgment in favor of the respondent. In its opinion, reported in 19 N. J. Misc. Rep. 322, a copy of which is attached hereto, the court stated that it was not necessary to determine the constitutionality of the statute insofar as the provisions thereof in abrogation of appellants' contractual rights, were con-

cerned. It held, however, that appellants' suit could not be maintained because appellants had not secured the permission of the New Jersey Supreme Court to institute suit in accordance with section 52:27-38 of the statute. The effect of this holding, therefore, was to sustain the validity of the entire statute as well as section 52:27-38.

An appeal was taken to the Court of Errors and Appeals of the State of New Jersey and appellants assigned as grounds of appeal, among others, the constitutional objections raised in the proceedings below. The Court of Errors and Appeals considered these constitutional objections but affirmed the decision of the New Jersey Supreme Court, holding that the statute was a valid exercise of the police powers of the State of New Jersey and that it did not impair the obligation of appellants' contracts. A copy of the opinion of the Court of Errors and Appeals, reported in 127 N. J. L. (Adv. Rep.) 239, is attached hereto.

Before each of these courts, therefore, appellants urged that the statute quoted above as construed and applied was invalid and unconstitutional under Article I, Section 10 of the Constitution of the United States and a violation of appellants' rights and privileges under the Fourteenth Amendment thereto. Each tribunal held that the question was properly raised before it and rendered a decision adverse to the appellants, sustaining the validity of the statute.

Decisions of the Supreme Court of the United States which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U. S. 513, 80 L. ed. 1309 (1936); *United States* v. *Bekins*, 304 U. S. 27, 82 L. ed. 1137 (1938); *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529 (1819); *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 806 (1827); *Baldwin* v. *Hale*, 1 Wall. 223, 17 L. ed. 531 (1864); *Baldwin* v. *Bank of Newbury*, 1 Wall. 234, 17 L. ed. 534 (1864); *Denny* v. *Bennett*, 128 U. S.

489, 32 L. ed. 491 (1885); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261, 73 L. ed. 318; *United States* v. *Mayor of New Orleans*, 103 U. S. 358, 26 L. ed. 395 (1881); *Louisiana* v. *Pilsbury*, 105 U. S. 278, 26 L. ed. 1090 (1882); *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413 (1934); *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426, 78 L. ed. 1344 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 79 L. ed. 1298 (1935).

The purpose and effect of the New Jersey statute above quoted is to permanently wipe out the old obligations of a municipality and to compel non-assenting creditors to accept what a composition effected thereunder gives them. It is in effect a state municipal bankruptcy act, granting a discharge to the municipality by forbidding suit upon old obligations issued before the enactment of the statute. In this case, the statute and the plan adopted thereunder operate to permit the most flagrant kind of impairment of the obligation of appellants' contracts. Appellants are prohibited from enforcing their bonds or from recovering accrued interest thereon, and, in place of their old obligations which were issued long before the statute was passed and which had fallen due before the composition plan under the statute had been adopted, are forced to accept new bonds maturing some thirty years later and bearing a much lower interest rate.

The decisions of the Supreme Court of the United States above cited clearly establish that a state bankruptcy act such as this one, discharging contracts made before the passage of the act, is unconstitutional as impairing the obligation of contracts and cannot be sustained as a reasonable exercise of the police powers of the state.

Two recent decisions of this Court contain dicta directly in point condemning such legislation as violative of the Federal Constitution. In *Ashton* v. *Cameron County Water Improvement District No. 1*, 298 U. S. 513, 80 L. ed. 1309

(1936) and *United States* v. *Bekins*, 304 U. S. 27, 82 L. ed. 1137 (1938), the Court passed upon the constitutionality of the first and second Federal Municipal Bankruptcy Acts; the first act was held unconstitutional in the *Ashton* case and the second act was held valid in the *Bekins* case. In each decision this Court expressly stated that legislation effecting a compulsory composition of the indebtedness of a municipal corporation was beyond the constitutional powers of a state to enact.

In the *Ashton* case, a five to four decision, both the majority by Mr. Justice McReynolds and the minority by Mr. Justice Cardozo explicitly so held, citing as authority the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529 (1819). Mr. Justice McReynolds said (298 U. S. 513 at p. 531):

> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under the form of a bankruptcy act or otherwise. Sturges *v.* Crowninshield, 4 Wheat. 122, 191."

Mr. Justice Cardozo said (298 U. S. 513 at p. 534):

> "Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. Sturges *v.* Crowninshield, 4 Wheat. 122. Relief must come from Congress if it is to come from any one."

In the *Bekins* case, a six to two decision with Justices McReynolds and Butler dissenting, Chief Justice Hughes, writing for the majority, said (304 U. S. 27, at p. 53, *et seq.*):

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief.
>
> * * * * * * *

"The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation * * * The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue."

Statutes of other States, similar in purpose and scope to the New Jersey compulsory composition statute here involved, have also been condemned by State courts as unconstitutional on the grounds here urged by appellants. *Pryor* v. *Goza*, 172 Miss. 46, 159 So. 99 (1935); *Los Angeles County* v. *John E. Rockhold*, 3 Cal. (2d) 192, 44 P. (2d) 340 (1935).

It is respectfully submitted that there is basis upon which the Supreme Court of the United States has jurisdiction to review the judgment of the Court of Errors and Appeals of the State of New Jersey in this cause.

ARTHUR T. VANDERBILT,
Attorney for Appellants.

Dated: December 15, 1941.

EXHIBIT "A".

Filed March 28, 1941.

NEW JERSEY SUPREME COURT, ESSEX COUNTY.

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, *Plaintiffs*,

vs.

CITY OF ASBURY PARK, a Municipal Corporation, *Defendant*.

Opinion.

Arthur T. Vanderbilt, Attorney of Plaintiffs.
Ward Kremer, Attorney for Defendant.

SMITH, JOSEPH L., *S. C. C.*:

This comes on a motion of the defendant to strike the complaint filed herein as setting forth no legal cause of action. The plaintiffs' suit is to recover on bonds and interest coupons issued by the defendant and held by the plaintiffs. The grounds set forth in the motion to strike the complaint are that the complaint does not set forth a legal cause of action; that the complaint does not aver that the plaintiffs have obtained the permission of the New Jersey Supreme Court to institute the present suit; that the defendant has in operation a refunding plan controlling the plaintiffs' claim; that the plaintiffs are controlled by the terms and provisions of N. J. S. A. 52:27-34, *et seq.*; and that the plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the present suit.

The procedural propriety of the motion is questionable in view of the fact that the complaint, on its face, without the qualification of extraneous matters, does set forth a cause of action, and the grounds stated in the motion would have been stated more properly by way of an answer. However, all the relevant facts are admitted by both parties and concededly there are no issues of facts to be determined, and solely a question of law is left for determination. Under these circumstances, the court will con-

sider the motion on the merits rather than on procedural grounds.

The defendant concedes the issuance of bonds now held by the plaintiffs; it shows, however, that on or about March 7th, 1935, it, the City of Asbury Park, was placed under the control of a Municipal Finance Commission, pursuant to N. J. S. A. 52:27-1, *et seq.*; thereafter, a plan for refunding of the bonded indebtedness of the city was filed with the New Jersey Supreme Court, pursuant to N. J. S. A. 52:27-34, *et seq.*, whereupon the Supreme Court assumed jurisdiction over the proceedings.

In due course the court approved the refunding plan, subject to the approval of the plan by 85% or more, in amount of the indebtedness affected by the plan. Subsequently, the necessary percentage of consents was obtained, and the plan was put into operation on June 15th, 1938. The contention of the defendant is that the claim or interests of the plaintiffs, are governed and controlled by the said plan. Justice Perskie, in his order approving the modified plan of adjustment, under date of April 29th, 1938, states that:

"It (referring to the plan) is not detrimental to other creditors of the municipality."

The said order also provides that the Supreme Court shall retain jurisdiction over the proceedings, in accordance with the statutes and for the purpose of determining such matters as are provided under the said amended refunding plan for the court's determination.

The plaintiffs contend that the statute in question, under which the proceedings in the Supreme Court were held, and upon which would be based the defendant's defense, are unconstitutional.

Under the circumstances stated, it is not necessary to determine the constitutionality of N. J. S. A. 52:27-1, -34, *et seq.*, insofar as the provisions thereof, in abrogation of contractual rights of plaintiffs, are concerned. The statute in question, 52:27-38, provides that the Supreme Court shall retain jurisdiction over the proceedings even after the entry of the order approving the adjustment; that thereafter no creditor shall bring action without the per-

mission of the Supreme Court. In compliance with this statute, our Supreme Court, under the order of Mr. Justice Perskie, has accepted and retained jurisdiction over the proceedings, even as to subsequent actions,

"In accordance with the statute in such cases made and provided—."

In the face of our Supreme Court having assumed jurisdiction over the matter and having expressly retained such jurisdiction for further proceedings, this court will require compliance with the provisions of that order, and with the provisions of the statute requiring that permission of the Supreme Court be obtained prior to the bringing of such an action. Such permission concededly lacking in the case, the motion to strike the complaint will be granted: an order will be entered accordingly.

(Signed) JOSEPH L. SMITH,
Supreme Court Commissioner.

March 27th, 1941.

EXHIBIT "B".

New Jersey Court of Errors and Appeals No. 27, May Term, 1941.

FAITOUTE IRON & STEEL COMPANY, a Corporation, and MOSES W. FAITOUTE, Appellants,

v.

CITY OF ASBURY PARK, a Municipal Corporation, Respondent.

Submitted May, 1941. Decided Sep. 19, 1941.

On Appeal From Supreme Court.

For appellant, Arthur T. Vanderbilt, John A. Ackerman, G. Dixon Speakman.

For respondent, Ward Kremer.

The opinion of the court was delivered by Bodine, J.

The appeal is from an order striking the complaint. It contained four counts. The corporation and the individ-

ual plaintiffs are both residents of this state and are the owners of certain bonds issued by the defendant municipality which are in default and have not been paid as agreed. The city moved to strike the complaint, in that the city had in operation an approved refunding plan and the payment of the bonds in suit was controlled thereby pursuant to N. J. S. A. 52:27-1, et seq. and N. J. S. A. 52:27-34 et seq., and lastly that permission of the New Jersey Supreme Court, a statutory requisite, to the institution of the present proceeding had not been obtained.

It appears that on March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission pursuant to the provisions of N. J. S. A. 52:27-1 et seq. The city was, at that time, in default in the payment of interest on its bonded indebtedness. On February 1, 1936, a plan for the refunding of its bonded debt was filed in the Supreme Court pursuant to the terms and provisions of N. J. S. A. 52:27-34 et seq. and the court took jurisdiction of the proceedings. The plan provided for the refunding of $10,750,000 of outstanding bonds and included among the bonds to be refunded were the bonds mentioned in the complaint. The plan, as amended, was approved by an order dated July 21, 1937. The order provided that the plan should, before becoming effective, be approved by creditors representing eighty-five per centum in amount of the indebtedness affected and approval to be evidenced in writing, in accordance with the terms and provisions of the statute in such case made and provided (N. J. S. A. 52:27-36).

On September 28, 1937, the Municipal Finance Commission of this State, by resolution, approved the amended plan, providing the requisite number of creditors should consent thereto in accordance with the statute.

On April 29, 1938, creditors representing in excess of eighty-five per centum in amount of the indebtedness affected consented to the plan, so that an order was then entered in the court approving the refunding plan and approving the adjustment or composition therein contained in accordance with the statute (N. J. S. A. 52:27-36).

The refunding plan was put into operation June 15, 1938, and the bondholders, who had consented in writing to

the terms and provisions of the refunding plan, exchanged their outstanding bonds for new bonds issued to them in accordance with the terms of the plan.

The plan seems to have been fair and in all respects equitable.

The first question for us to determine is: Could the court strike the complaint which alleged a perfectly good cause of action and, which, without proof of the refunding plan, would have stood?

The adoption of the refunding plan under the circumstances of this case, was or was not a defense which barred the action. Such a defense, since it goes to the whole action, should have been raised by answer. The complaint, as before noted, did not fail to state a cause of action and it was not sham. The statute provides when a complaint may be struck (N. J. S. A. 2:27-125). A motion to strike, like a common law demurrer, admits every fact well pleaded; so it is a curious departure to strike a complaint because of allegations contained in affidavits filed by the moving party. The proper practice is suggested in the following cases: Gross *v.* New York C. R. R. Company, 99 N. J. L. 414; Brooks *v.* Metropolitan Life Insurance Company, 70 Id. 36; Fidelity Union Trust Company *v.* Pavlovsky, 17 17 N. J. Misc. 10; Koewing *v.* West Orange, 89 N. J. L. 539; Tanis *v.* Passaic County, 122 Id. 486; Lully *v.* National Surety Company, 106 Id. 81, 83.

The point is also made that the affidavits used state opinions and not fact. This, of course, is ordinarily a fatal defect. The real question was the constitutionality of the refunding act. The material facts in the case are not in dispute. We will treat the pleadings as though amended and consider the merits since the question presented is one which should be speedily determined. If there had been a disputed fact issue the court, in the absence of consent, could not have passed upon the merits. Standard Radio Corporation *v.* Triangle Radio &c., 125, N. J. L. 131.

This brings us to the constitutional question. Appellant argues that the composition statute (N. J. S. A.) 52:27-34, 39) is unconstitutional since it impairs the obligation of contract. We have held its predecessor not faulty. Hourigan *v.* North Bergen Township, 113, N. J. L. 143.

Mr. Justice Heher, in that case, said of the statute: "The act confers upon the finance commission, in respect of the municipality's financial affairs, powers somewhat akin to those exercised by receivers of insolvent corporations. * * * Its primary purpose is to keep intact the corporate structure, and to continue municipal function until rehabilitation can be effected. This is, of necessity, a proper legislative function, and the rights of creditors, in such a situation, are secondary. It is a proper exercise of police power. It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected." Hourigan *v.* North Bergen Township, 113 N. J. L. 149.

N. J. S. A. 52:27-65 is as follows: "It is declared that this chapter is intended by the legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations and the resulting impairment of public credit, requiring intervention by the state to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers, and that this chapter is remedial in nature and the powers hereby granted shall be liberally construed."

At the time of the adoption of the plan, pursuant to the statute, the credit of Asbury Park had suffered greatly. The bonds issued to the plaintiffs long before the enactment of the statute had little value. The new bonds issued under the plan are not in default and there is a very substantial market for them.

It is argued that a municipal bankruptcy act is within the exclusive jurisdiction of Congress. United States *v.* Bekins, 304 U. S. 27. The statute there approved was passed in 1937 (50 Stat. 654). Our statutes were of 1931-1933 origin.

The court proceedings thereunder were initiated February 1, 1936. No obligation of contract was discharged, but provision was made, under the supervision of compe-

tent judicial authority, for the collection of the debts owed by a municipality then in default by a fair means. How little the bondholder's right is changed is illustrated by Lyon *v.* Elizabeth, 43 N. J. L. 158; Piscataway Two *v.* First National Bank of Dunellen, 111 Id. 412; Vanderpool *v.* Mount Ephriam, Id. 423.

The holder of a defaulted municipal bond, before the statute, could take judgment and enforce payment only by mandamus, a discretionary writ. Under the plan in question, a bondholder secures a new remedy for an existing right—a remedy uniform to all in the same class and well within the legislative power. If we assume the act had not been passed and all bondholders had secured judgments, they would then have had to go to the Supreme Court for writs of mandamus to secure payment. The court would, no doubt, have provided some means of enforcing the judgments so as to do no irreparable public injury. What more appropriate than a legislative plan to secure payment under the supervision of a commission and the court. The plan is fair alike to the bondholders and the citizens dependent upon good government. Of course, priorities cannot be destroyed under such a plan. State ex rel Phelps *v.* Fort Lee, 14 N. J. Misc. 895, affirmed 191 Atl. Rep. 836.

Lastly, we cannot regard the federal enactment as one that puts to sleep the state power to provide an equitable means for the collection of municipal obligations, or as invalidating a prior proceeding taken under a state statute in good faith. It is not to be supposed that the sovereign may not provide a means which insures payment of defaulted municipal obligations in an orderly manner.

The judgment is affirmed with costs.

Endorsed: "Filed Sep. 19, 1941. J. A. Brophy, Clerk."

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

On Appeal from the Court of Errors and Appeals of New Jersey.

BRIEF OF APPELLANTS.

ARTHUR T. VANDERBILT,
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Newark, N. J.,
April, 1942.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF OF APPELLANTS.

I.

The Opinions of the Courts Below.

The opinion of the Supreme Court of New Jersey is reported in 19 N. J. Misc. 322, and appears in the Record at page 65.

The opinion of the Court of Errors and Appeals of New Jersey is reported in 127 N. J. L. 239, and appears in the Record at page 70.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is September 19, 1941, (R. 74). The date upon which application for

appeal was presented was December 15, 1941 (R. 79). The Order allowing Appeal was dated December 16, 1941 and filed December 20, 1941 (R. 79).

2. The statutory provisions sustaining jurisdiction over this appeal appear in Title 28, U. S. Code, Section 344 (a), (Act of February 13, 1925, c. 229, Section 237, 43 Stat. 937) and in Title 28 U. S. Code, Sections 861 (a) and 861 (b) (Act of January 31, 1928, c. 14, 45 Stat. 54; Act of April 26, 1928, c. 440, 45 Stat. 466).

3. Decisions which sustain the jurisdiction of the Supreme Court of the United States to review this cause upon appeal are: *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936); *United States* v. *Bekins*, 304 U. S. 27 (1938); *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819); *Ogden* v. *Saunders*, 12 Wheat. 213 (1827); *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Baldwin* v. *Bank of Newbury*, 1 Wall. 234 (1863); *Denny* v. *Bennett*, 128 U. S. 489 (1888); *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (1929); *Wolff* v. *New Orleans*, 103 U. S. 358 (1880); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881); *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934); *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934); *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935).

III.

Statement of Case.

The question presented for determination by this appeal is whether the State of New Jersey has the power to enact a municipal insolvency act which provides for a compulsory composition of pre-existing contracts.

The appellants are owners, in the aggregate of $105,000.00 in principal amount, of unpaid bonds of the City of Asbury Park, New Jersey, to which are attached $889.80 of unpaid interest coupons. These bonds were issued in the year 1929 or 1930, bore interest at the rate of five and three-quarters per cent. or six per cent. per annum, and were due and payable in the years 1933, 1934, or 1935 (R. 4-7). In 1933 the compulsory composition statute here challenged was enacted. Pursuant to that statute, proceedings were instituted on February 1, 1936 for the adoption of a refunding plan for the City of Asbury Park (R. 10). On April 29, 1938, a plan was approved by the New Jersey Supreme Court, and was put into operation on June 15, 1938 (R. 10). Under the terms of the plan, the City of Asbury Park agreed to pay interest on the bonds at the contract rate until December 31, 1933, to pay interest for the years 1934, 1935, 1936 and until December 1, 1937 at the reduced rate of three per cent. per annum, and to issue new bonds dated December 1, 1937, maturing in 1966, over thirty years after the maturities of the old bonds, and bearing interest at the rate of four per cent. per annum to holders in exchange for their old bonds (R. 11, Schedule A, R. 12).

This appeal brings up for review the judgment of the Court of Errors and Appeals of New Jersey sustaining the validity of the New Jersey statute, Article 7 of Chapter 27 of Title 52 of the Revised Statutes, enacted June 27, 1933,* providing for a composition of claims of creditors of municipalities within the state, as against the objections of the appellants that the statute violated the Constitution of the

* Article 7 of Chapter 27 of Title 52 of the Revised Statutes is printed as an Appendix to this Brief.

United States in that it impaired the obligation of contracts, deprived appellants of due process of law, denied them the equal protection of the laws and abridged the privileges and immunities of appellants as citizens of the United States.

Suit was originally instituted in the Supreme Court of New Jersey by Faitoute Iron & Steel Company, and Moses W. Faitoute. During the course of the proceedings Moses W. Faitoute died and appellants, The Howard Savings Institution, Florence W. Faitoute, Claire Faitoute White, and William G. Carter, as executors of the Estate of Moses W. Faitoute, were substituted as parties plaintiff.

The complaint filed by appellants in the New Jersey Supreme Court is in four counts and seeks to recover on unpaid bonds and interest coupons issued by appellee. It alleges in the First, Second and Third Counts that the corporate appellant, Faitoute Iron & Steel Company holds in the aggregate $100,000.00 principal amount of unpaid bonds to which are attached $616.50 of unpaid interest coupons. A judgment was sought on these counts in these amounts, plus interest at the legal rate from the respective due dates of the bonds and coupons. The Fourth Count alleges that the individual plaintiff, Moses W. Faitoute, holds $5,000.00 principal amount of unpaid bonds and is owed the sum of $273.30 unpaid interest and this count sought judgment in those amounts, plus interest thereon from the respective due dates of the bonds and interest payments. The complaint alleges in each count the issuance and ownership of the bonds and coupons, that they were not paid on the due dates thereof and that the amount thereof is due and owing. It is also alleged that the bonds

sued upon were dated in the year 1929 or 1930, bore interest at the rate of five and three-quarters per cent. or six per cent. per annum, and were due and payable in the years 1933, 1934, or 1935. (R. 4-7.)

After filing affidavits of merits (R. 7-8), the appellee, by notice of motion (R. 9) and supplemental notice of motion (R. 60), moved to strike the complaint for the following reasons:

> "1. The defendant, City of Asbury Park, has in operation a refunding plan and the claims of the plaintiffs are controlled by the terms and provisions of the said refunding plan.
>
> 2. The claim of the plaintiffs is controlled by the terms and provisions of N. J. S. A. 52:27-1 *et seq.* and N. J. S. A. 52:27-34, *et seq.*
>
> 3. The plaintiffs have not obtained permission of the New Jersey Supreme Court to institute the above entitled cause of action.
>
> 4. The complaint does not set forth a legal cause of action.
>
> 5. The complaint does not aver that plaintiffs have obtained permission of the New Jersey Supreme Court to institute the said cause of action."

In support of its motion, the appellee, over objection of appellants, offered the affidavits of Milford G. Farley, city manager of the City of Asbury Park (R. 9) and of Walter P. Haight, auditor and comptroller of the City of Asbury Park (R. 61). In the affidavit of Mr. Farley it is stated that on or about March 7, 1935, the City of Asbury Park was placed under the control of the Municipal Finance Commission pursuant to R. S. 52:27-1, *et seq.*; that the city

was then in default on the payment of interest on its bonded indebtedness; that on or about February 1, 1936, proceedings were instituted in the New Jersey Supreme Court pursuant to R. S. 52:27-34, *et seq.* for the adoption of a refunding plan for the refunding of $10,750,000 of outstanding bonds of the city, including the bonds of appellant; that said plan was approved by the Supreme Court on July 21, 1937, subject to the approval of creditors representing eighty-five per centum in amount of the indebtedness thereby affected; that the Municipal Finance Commission approved the plan on September 27, 1937; that on April 29, 1938, the necessary percentage of creditors having consented to the plan, it was finally approved by the Supreme Court of New Jersey in accordance with the provisions of R. S. 52:27-36; that the plan was put into operation on June 15, 1938, and has been in operation continuously since that time, bondholders who consented to the plan having exchanged their outstanding bonds for new bonds issued under the plan. It is further stated that it is the belief of the affiant that the plan is made binding upon all creditors by R. S. 52:27-37 and that the bonds of appellants are controlled by said plan, and that the appellants have no cause of action against the City of Asbury Park since they have not secured the permission of the Supreme Court to institute the present suit as required by R. S. 52:27-38 (R. 11). Copies of the refunding plan (Schedule A, R. 12) and of the order of the Supreme Court, dated April 29, 1938, approving the plan (Schedule B, R. 57) were attached to the affidavit.

The affidavit further states that under the terms of the refunding plan, the City of Asbury Park agreed to pay all interest on outstanding bonds at the contract rate up to

and including December 31, 1933, to pay all interest for the years 1934, 1935, 1936 and until December 1, 1937 at the rate of three per cent. per annum, and to issue bonds dated December 1, 1937, maturing in 1966, and bearing interest at the rate of four per cent. per annum to holders in exchange for their outstanding bonds (R. 11; Schedule A, R. 12).

The affidavit of Mr. Haight states that the bonds of appellants here sued upon were included in the refunding plan and that provisions were entered to refund the said bonds as provided therein (R. 61).

The answering affidavit of Moses W. Faitoute (R. 63), offered by appellants after their objection to appellee's use of affidavits in support of its motion was overruled, states that the appellants have never approved or consented to the refunding plan and that they have never appeared, by attorney or otherwise, in the proceedings in the New Jersey Supreme Court in connection with the same (R. 63). It is further stated that it is the belief of the affiant that the said refunding plan and the statute under which the same was adopted are not binding upon appellants and constitute no legal defense to their suit nor a basis for striking the complaint for the following reasons, *inter alia:* (1) said statute (R. S. 52:27-34 to 39) is unconstitutional since it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States; (2) it deprives appellants of property without due process of law and denies appellants the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States; and (3) the statute was rendered nugatory and

inoperative and was superseded by the enactment by Congress of an amendment to the Federal Bankruptcy Act entitled "Provisions for the Emergency Temporary Aid of Public Debtors" approved by Act May 24, 1934, c. 345, 48 Stat. 798 as amended (hereinafter referred to as the first Federal Municipal Bankruptcy Act) and of an amendment to the Federal Bankruptcy Act entitled "Composition of Indebtedness of Local Taxing Agencies" approved by Act August 16, 1937, c. 657, 50 Stat. 654 as amended (hereinafter referred to as the second Federal Municipal Bankruptcy Act) (R. 64-65).

A hearing on the motion was had before Supreme Court Commissioner Joseph L. Smith on January 31, 1941, at which time the notices of motion and the affidavits referred to above were filed with the Court. Appellants objected at the hearing to the use by appellee of its affidavits in support of its motion as being procedurally improper, but, upon the said affidavits being received by the Court, offered the answering affidavit of Moses W. Faitoute, summarized above, on their behalf. The Court at that time heard the arguments of counsel as to the effect and validity of the statute and refunding plan referred to in the motion papers and affidavits.

On March 27, 1941, the New Jersey Supreme Court filed its opinion (R. 65) in which it concluded that the motion to strike the complaint should be granted.

The Court stated that it was not necessary to determine the constitutionality of R. S. 52:27-1, 34, *et seq.* insofar as the provisions thereof in abrogation of contractual rights of appellants were concerned. It held that, since R. S. 52:27-38 provides that the New Jersey Supreme Court

shall retain jurisdiction over the proceedings in connection with the refunding plan even after approval of the plan and further requires that the permission of the New Jersey Supreme Court be secured before a creditor may bring action, and since the New Jersey Supreme Court, in approving the plan, had expressly assumed and retained such jurisdiction for further proceedings, compliance with the provisions of that order and with the provisions of R. S. 52:27-38 would be required and the motion to strike the complaint granted since such permission had not been secured by appellants (R. 65-67).

Accordingly, on April 4, 1941, an order striking the complaint (R. 67) was signed by the Court and final judgment in favor of appellee dismissing the complaint with costs was entered on April 9, 1941 (R. 68).

Thereupon, your appellants filed their notice of appeal to the Court of Errors and Appeals of New Jersey, setting forth, in addition to certain objections, procedural and otherwise, not here involved, the following grounds (R. 1-3): (a) The New Jersey Supreme Court erred in granting the appellee's motion to strike the complaint in that the statute of the State of New Jersey (R. S. 52:-27-38) purporting to require the obtaining of permission from the New Jersey Supreme Court to bring said suit, and upon the basis of which the said motion was granted, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States, and in that such statute deprives the appellants of their property without due process of law and denies appellants the equal protection of the laws and abridges privileges and immunities of

citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. 2); (b) The New Jersey Supreme Court erred in granting appellee's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey, providing for a compulsory composition of municipal bonds purporting to be binding on appellants and to wipe out the obligations sued on in the complaint herein, is unconstitutional and void in that it is a statute impairing the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States and in that such statute deprives appellants of their property without due process of law and denies them the equal protection of the laws and abridges privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. 2); (c) The Supreme Court erred in granting appellee's motion to strike the complaint in that Article 7 of Title 27 of Chapter 52 of the Revised Statutes of New Jersey, set forth in appellee's motion papers providing for a compulsory composition of municipal bonds purporting to be binding on appellants and to wipe out the obligations sued on in the complaint herein was rendered nugatory and inoperative and was superseded by the enactment by the Congress of the United States of an amendment to the Federal Bankruptcy Act entitled "Composition of Indebtedness of Local Taxing Agencies", approved by Act of August 16, 1937, c. 657, 50 Stat. 654 as amended.

The New Jersey Court of Errors and Appeals affirmed the judgment of the Supreme Court dismissing the appellants' complaint (R. 74). The constitutional objections here

raised were considered in the Court's opinion (R. 69), and it was held that the statute, so construed as to permit a compulsory adjustment and composition of the debts of a municipal corporation, which debts were incurred before the enactment of the statute, was a valid exercise of the police powers and did not impair the obligation of appellants' contracts.

IV.

Specification of Errors.

1. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the provisions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39, and the adoption of a plan of composition by appellee in accordance therewith operated to prevent suit to enforce recovery on appellants' bonds and coupons is illegal and erroneous, because said statute was enacted and said plan was adopted, after the issuance of said bonds and coupons, and said appellants did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied by the Court of Errors and Appeals of the State of New Jersey is unconstitutional in that it impairs the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States (R. p. 77).

2. The judgment of the Court of Errors and Appeals of the State of New Jersey in affirming the judgment of the New Jersey Supreme Court and in holding that the pro-

visions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39, and the adoption of a plan of composition by appellee in accordance therewith operated to prevent suit to enforce recovery on appellants' bonds and coupons is illegal and erroneous, because said statute was enacted and said plan was adopted, after the issuance of said bonds and coupons, and said appellants did not approve or consent to said plan nor did they appear in the proceedings in connection with the adoption of said plan. The statute as construed and applied deprives appellants of property without due process of law, denies appellants the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R. p. 78).

V.

ARGUMENT.

Summary of Argument.

Point I. The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), being a compulsory composition statute, is unconstitutional in that it impairs the obligation of contracts.

(a) The Composition Statute Impairs the Obligation of Contracts.

(b) The Composition Statute Cannot Be Sustained as an Emergency Measure Under the Police Power.

Point II. The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), being a compulsory composition statute, is unconstitutional in that it deprives appellants of property without due process of law, denies appellants the equal protection of the laws, and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT I.

The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, because Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), a compulsory composition statute, is unconstitutional in that it impairs the obligation of contracts.

The Court of Errors and Appeals of New Jersey erred in affirming the granting of a motion to strike appellants' complaint, since the New Jersey compulsory composition statute, R. S. 52:27-34 to 52:27-39, inclusive, is unconstitutional as impairing the obligation of pre-existing contracts in violation of the Federal Constitution insofar as it is applied to appellants, who have not consented to the refunding plan sought to be imposed upon them under the

statute, and have not appeared in any of the proceedings in connection therewith. As a consequence, the refunding plan of the City of Asbury Park is not binding on non-consenting bondholders and neither the plan nor the statute constitute a bar to this suit.

(a) The Composition Statute Impairs the Obligation of Contracts.

Article I, Section 10 of the Constitution of the United States provides as follows:

> "No state shall * * * pass any * * * law impairing the obligation of contracts * * *."

The composition statute here challenged was first enacted in 1933 (P. L. 1933, c. 331, p. 866) as a supplement to the Municipal Finance Commission Act and is now Article 7 of Chapter 27 of Title 52 of the Revised Statutes of 1937. It provides a scheme for the compulsory adjustment or composition of the obligations of municipalities in which the Municipal Finance Commission functions.

Sections R. S. 52:27-34 through R. S. 52:27-36 provide for the adoption of a refunding plan adjusting the claims of creditors of a municipality after approval by a justice of the New Jersey Supreme Court and by eighty-five per cent. in amount of the creditors affected thereby. Before giving his approval to the plan, the justice of the Supreme Court must determine that the municipality is unable to pay its obligations in full, that the composition is measured by the capacity of the municipality to pay, that it is in the interests of all the creditors affected thereby and that it is not detrimental to other creditors.

R. S. 52:27-37, which provides that the plan shall be binding upon all creditors included therein, reads as follows:

> "The plan of adjustment so authorized and approved shall forthwith and without further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order."

R. S. 52:27-38, requiring consent of the Supreme Court before the institution of suit under the plan and forbidding suit on the old obligations of the creditor, provides:

> "In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition."

The provisions of R. S. 52:27-39 are not here material.

Upon examination of the statute in the light of Article I, Section 10 of the Constitution of the United States and the cases construing that Section, its invalidity becomes apparent. The purpose and effect of the statute is to permanently wipe out the old obligations of a municipality

and to compel non-assenting creditors to accept what the refunding plan gives them. It is in effect a bankruptcy statute, granting a discharge to the municipality by forbidding suit upon the old obligations refunded under the plan.

Under the terms of the refunding plan adopted by appellee on April 29, 1938, these appellants, whose bonds were issued in 1929 and 1930, long before the statute was passed or the plan adopted, are forced to accept new bonds maturing in 1966 and bearing interest at the rate of four per cent. per annum in place of their obligations which had fallen due before the plan was adopted and which bore interest at the rate of either five and three-quarters per cent. or six per cent. per annum. Moreover, they are required to accept interest on their obligations at the rate of three per cent. per annum rather than at the contract rate or the legal rate for the years 1934, 1935, 1936 and for the first eleven months of the year 1937. (See Complaint, R. 4-7; Affidavit of Milford G. Farley, R. 11; Schedule A, Refunding Plan, R. 13, 14.)

It cannot be doubted that the statute permits the most flagrant kind of impairment of the obligation of contracts. It goes far beyond the impairment of remedies to enforce the contract; it strikes down the entire obligation by substituting a new one of entirely different terms without the consent of the creditor. It is submitted that the statute is unconstitutional beyond a shadow of a doubt and this conclusion is supported by a multitude of judicial decisions in both the federal and state courts running back over a period of one hundred and twenty-five years.

Two very recent decisions of the United States Supreme Court are directly in point in condemning such legislation

as violative of the Federal Constitution. *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936); *United States* v. *Bekins*, 304 U. S. 27 (1938). The Court in those cases was concerned with the constitutionality of the first and second Federal Municipal Bankruptcy Acts respectively. The first act was held unconstitutional in the *Ashton* case; the second act was held valid in the *Bekins* case. But in both decisions the Court expressly stated that such legislation, effecting a compulsory composition of the indebtedness of a municipal corporation, was beyond the constitutional powers of a state to enact.

In the *Ashton* case, a five to four decision, both the majority by Mr. Justice McReynolds and the minority by Mr. Justice Cardozo explicitly so held, citing as authority the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819). Mr. Justice McReynolds said (298 U. S. 513, at p. 531):

> "The Constitution was careful to provide that 'No State shall pass any Law impairing the Obligation of Contracts.' This she may not do under the form of a bankruptcy act or otherwise. Sturges *v.* Crowninshield, 4 Wheat. 122, 191."

Mr. Justice Cardozo said (298 U. S. 513, at p. 534):

> "Nor was there hope for relief from statutes to be enacted by the states. The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. Sturges *v.* Crowninshield, 4 Wheat. 122. Relief must come from Congress if it is to come from any one."

In the *Bekins* case, a six to two decision with Mr. Justice McReynolds and Mr. Justice Butler dissenting, Chief Justice Hughes, writing for the majority, said (304 U. S. 27, at pp. 53, 54):

> "In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief.
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> • • •
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> "The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation • • • The State acts in aid, and not in derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue."

The Court in the *Bekins* case relied heavily upon the report of the Judiciary Committee of the House of Representatives supporting the validity of the federal act under consideration in the case. That report revealed that one of the reasons for the federal act was the fact that state statutes such as the one here in question are forbidden by the limitations of the Federal Constitution. The Committee, as quoted by the Court, said (304 U. S. 27, at p. 51):

> " 'There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore, relief must come from Congress, if at all.' "

These very recent opinions by the Supreme Court of the United States would seem to be sufficient authority in them-

selves to strike down the New Jersey legislation here involved, but brief reference will be made to a few of the earlier and underlying authorities upon which this conclusion is based.

The great body of law which has developed under the contracts clause of the federal constitution stems from the leading case of *Sturges* v. *Crowninshield*, 4 Wheat. 122 (1819). There, Chief Justice Marshall held that while a state could pass a bankruptcy law so long as Congress had not acted within its constitutional powers on the subject, the state act could not impair the obligation of contracts, and that a state insolvency act of New York which discharged a contract made before the statute was passed did impair the obligation of contracts and was void. The principle of the case has been followed for more than one hundred and twenty years without repudiation. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827); *Baldwin* v. *Hale*, 1 Wall. 223 (1863); *Denny* v. *Bennett*, 128 U. S. 489, (1888); see *International Shoe Co.* v. *Pinkus*, 278 U. S. 261 (1929).

The principle has been applied in innumerable cases involving attempts by state legislatures to alter or repudiate the obligations contained in municipal bonds. It is significant, however, that in no case considered by the United States Supreme Court has any state legislature purported to go so far as the New Jersey act here in question. A reference to two decisions holding unconstitutional state acts of this general nature is pertinent. *Wolff* v. *New Orleans*, 103 U. S. 358 (1880); *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881). In these cases the municipality had issued bonds. Taxes were considered too high so a plan was prepared providing for the issuance of new bonds to replace

the old ones using a lower interest rate and a maturity date to be determined by lot. In order to coerce the bondholders to accept the new plan, the State of Louisiana passed a statute limiting the amount of taxes to be levied for debt service and prohibiting proceedings to enforce the old obligations. The statute was held unconstitutional in each case as impairing the obligation of contracts.

In the *Pilsbury* case, Mr. Justice Field condemned the legislation in language particularly appropriate to the New Jersey act under discussion (105 U. S. 278, at p. 300):

> "If the provisions of this act nullifying the pledges of the Act of 1852 are valid, the consolidated bonds are virtually destroyed; no taxation is allowed to raise funds for them; their payment, therefore, would be so uncertain as to render them practically valueless. The chance with premium bonds offered in their place of a favorable turn of the wheel in a lottery would be a poor substitute for the levy of an annual tax for the payment of interest and principal. We shall not waste words upon the scheme thus developed to evade the just obligations of the city. Notwithstanding the declaration in its preamble, that the act seeks from the creditors the indulgence necessary 'for the public well-being and the maintenance of the public honor,' it is, so far as the consolidated bonds are concerned, tainted with the leprosy of repudiation. It says to the creditors: 'Take these premium bonds, and trust for payment within fifty years to your fortune in the lottery we offer; no other way is left open to obtain a possible payment. No tax can be levied for your benefit. No compulsory writ can issue from the courts. Take these bonds or take nothing.' The primal duty of the

> city authorities to fulfill punctually their obligations and maintain good faith is thus proclaimed to be no duty at all."

The State of Mississippi has passed legislation similar in purpose and scope to the New Jersey composition statute relied upon here and in the case of *Pryor* v. *Goza*, 172 Miss. 46 (1935), the Supreme Court of Mississippi held such legislation unconstitutional as violating the contracts clauses of both the federal and state constitutions. This case, therefore, is directly in point in support of appellants' contentions.

The statute there involved applied to drainage districts which had issued bonds and provided that, if upon a valuation of the assets of the district, it should be found that such value was less than the indebtedness of the district, liquidation certificates should be issued to bondholders in proportion to the reduced value of their bonds. The effect of the scheme was that the indebtedness of the district was scaled down to the extent of the reduction in value of the assets and the bonds wiped out as obligations. The substituted liquidation certificates, it was provided, could be made due and payable at different dates from the original bonds and when discharged the bonds of the district could not be made subject to further taxes to pay the balance due on the bonds. The Mississippi Supreme Court held that the statute attempted to provide a scheme of bankruptcy for a political subdivision of the state and that, as a state bankruptcy law discharging liability on contracts entered into before its passage, it impaired the obligation of contracts and was void. The language of the Court is peculiarly applicable to the case at bar (172 Miss. 46, at pp. 53, 54):

"Would the enforcement of the statute impair the obligation of the contract evidenced by the bonds held by appellees? We think it clear that that question must be answered in the affirmative. Where a statute makes the contract more beneficial to one party and less to the other than its terms provide, its obligation is impaired; releasing only a part of the obligation impairs the contract. A law which enlarges, abridges, or in any substantial manner changes the intention of the parties as expressed in the contract impairs the obligation. A law dispensing with any substantial force of the contract imposing conditions not expressed, or dispensing with those expressed, is a violation of its obligation.

* * *

"A state bankruptcy law discharging liability on contracts entered into before its passage impairs the obligation of such contract and is void. Sturges *v.* Crowninshield, supra; Ogden *v.* Saunders, supra; Denny *v.* Bennett, 128 U. S. 497, 9 S. Ct. 134, 32 L. Ed. 491. The bonds here involved were issued and sold in 1924 and the statute enacted in 1932. The contract clause of the Federal Constitution applies, not only to state action impairing the obligation of contracts of persons, partnerships, and corporations engaged in private business, but to contracts by the state itself and all of its political subdivisions, including counties, municipalities, and other taxing districts. New York Guaranty & I. Co. *v.* Board of Liquidation, 105 U. S. 622, 26 L. Ed. 1106; Hall *v.* Wisconsin, 103 U. S. 5, 26 L. Ed. 302; State of Louisiana *v.* Jumel, 107 U. S. 711, 2 S. Ct. 128, 27 L. Ed. 448; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705; State of Mississippi *v.* Miller, 276 U. S. 174, 48 S. Ct. 266, 72 L. Ed. 517.

> "We conclude that the statute is violative of the contract clause of both the state and Federal Constitutions, and therefore void."

In *County of Los Angeles* v. *John E. Rockhold*, 3 Cal. (2d) 192 (1935), the Supreme Court of California dealt with the constitutionality of the Refunding Special Assessment Bond Act of 1933 which permitted the adoption of a refunding scheme by a political subdivision of the state upon consent of seventy-five per cent. of the bondholders thereof. The scheme provided for reduction of interest and principal of outstanding bonds. The Court held that the scheme was unconstitutional as impairing the obligation of contracts since no provision was made to protect dissenting bondholders. As to the impairment of contract obligations, the Court said (3 Cal. (2d) 192, at p. 210):

> "The second ground of unconstitutionality urged by respondent is that by the 1933 act the contract of the bondholders has been impaired. As already stated, the act provides that the refunding may take place when 75 per cent of the holders of outstanding bonds consent. Under the refunding scheme, the nature of the security is changed and the principal and interest of the bonds are reduced. It is plain, therefore, that the obligation of the existing bonds is impaired. As to the 75 per cent or more bondholders who consent, there is, of course, no complaint. But as to the non-consenting bondholders, including those who are absent and those incapacitated or incompetent, who may hold up to 25 per cent of the bonds, there is an obvious impairment, if their bonds are canceled and they are forced to take new bonds with a different security, in a lesser amount, and bearing a reduced interest, or if their security is lessened."

* * * * * *

"Counsel for petitioner and *amici curiae* in its behalf, in oral argument and in their final briefs, concede that no change can be made in the bondholders' contract, unless 100 per cent of the bondholders consent thereto, or unless some provision is made for all dissenting bondholders. *There can be no doubt that it is indispensable, from a constitutional standpoint, so far as bondholders are concerned, that either 100 per cent consent to the change or that the dissenting bondholders be so taken care of that no impairment of their contract ensues.**

* * * * * *

"With this concession made by petitioner, the problem becomes one of interpretation rather than constitutionality. They admit that the proceedings cannot be completely effective without the consent of 100 per cent of the bondholders, and all they demand is that those proceedings be initiated when the requisite 75 per cent has been obtained. They admit that no bond can be canceled, or the obligation represented by it impaired in any way, unless the consent of the holder be first obtained, or unless some adequate means of payment be made.

"We are of the opinion that in spite of the concessions made by petitioner, and giving the act the broadest and most liberal interpretation, we cannot hold that the present act adequately safeguards the rights of dissenting bondholders. *Any act, to meet constitutional tests as far as the bondholders are concerned, must provide either for the consent of all the bondholders, or the rights of the dissenting bondholders must be protected.*"

Prior to the instant decision of the Court of Errors and Appeals, the rulings of the New Jersey courts had been

* All italics ours unless otherwise noted.

entirely in accord with the views of the United States Supreme Court and of sister states.

Thus, the New Jersey courts had held, even before the decision in *Sturges* v. *Crowninshield, supra,* that a state insolvency law is void as impairing the obligation of contracts if applied to pre-existing obligations. *Vanuxem* v. *Hazlehursts,* 4 N. J. L. 192 (Sup. 1818); *Olden* v. *Hallet,* 5 N. J. L. 466 (Sup. 1819); *Ballantine* v. *Haight,* 16 N. J. L. 196 (Sup. 1837).

In the leading case of *Rahway* v. *Munday,* 44 N. J. L. 395 (E. & A. 1882), the Court of Errors and Appeals dealt with an early attempt in New Jersey to render the obligation of municipal bonds impotent by hindering legislation, and Chief Justice Beasley there held that a state statute limiting the method of enforcing municipal bonds was unconstitutional as an impairment of the obligation of contracts and as depriving a party of a remedy for enforcing a contract.

A classic statement of the doctrine of impairment was delivered by Mr. Justice Depue in *Baldwin* v. *Flagg,* 43 N. J. L. 495 (Sup. 1881). In holding that a statute requiring foreclosure of a mortgage before instituting suit on a bond was unconstitutional and void as to antecedent obligations, he said (43 N. J. L. 495, at p. 503):

> "The obligation of a contract is synonymous with the ability to enforce its performance. It consists in the power and efficacy of the law which applies to and enforces performance of it, or an equivalent for non-performance. Thus, if a party contracts to pay a certain sum on a certain day, the contract binds him to perform it on that day, and this is its obligation. 2 *Story on Const.,* § 1378. It is per-

> fectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it, and the manner or degree in which this change is effected can in no respect influence the conclusion. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. 2 *Story on Const.*, § 1385. 'The obligation of a contract, in the constitutional sense,' says Mr. Justice Field, 'is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. * * * Any authorization of the postponement of payment, or of the means by which such postponement may be effected, is in conflict with the constitutional inhibition.' *Louisiana* v. *New Orleans*, 102 U. S. 206.
>
> "A legislative act which enlarges the time for the performance of an existing contract for a definite or indefinite period, however short, would plainly impair the obligation of the contract."

To similar effect is the decision of the same Court in the recent case of *Vanderbilt Trustee in Liquidation* v. *Brunton Piano Co.*, 111 N. J. L. 596 (E. & A. 1933). In the case of *State ex rel. Phelps* v. *Fort Lee*, 14 N. J. Misc. 895 (Sup. 1936), it was held that rights to priority of payment of tax revenue and anticipation notes issued by a municipality could not be destroyed by the Municipal Finance Commission Act or other subsequent legislation. Mr. Justice Bodine said (14 N. J. Misc. R. 895, at p. 904):

"The obligations were issued under legislative authority by force of which the holders thereof had a contractual obligation, which entitled them to payment either out of revenues received, but absolutely from taxes to be collected in the fourth year after issue. *Possessed of such an obligation no change thereof can be effected by the Municipal Finance Commission act or subsequent legislative enactment.*"

It is apparent, therefore, that the New Jersey Court of Errors and Appeals, in the present case, has rendered a decision not only contrary to those of the federal and other state courts, but at variance with the long-established course of New Jersey law.

Under the cases in this Court, and those of other states, it is clear that the composition statute, R. S. 52:27-34 to R. S. 52:27-39, inclusive, is void as in violation of the Federal Constitution since it impairs the obligation of contracts as applied to the bonds here sued upon.

The invalidity of the composition statute cannot be affected by the fact, suggested in the opinion of the Court of Errors and Appeals (R. 73), that in the absence of the statute a bondholder could enforce payment of his judgment only by the discretionary writ of *mandamus* and that the New Jersey Supreme Court, in considering the granting of such writ, would see to it that no irreparable public injury was done. Even if it be assumed that the courts of New Jersey could, by judicial decision, effectively deprive bondholders, such as the appellants, of any means of enforcing the obligations owned by them, it is settled beyond the need of argument that the State of New Jersey cannot, by legislative enactment, constitutionally diminish the obligation of

such bondholders' contracts, made prior to the passage of the legislation. See *Douglass* v. *Pike County*, 101 U. S. 677 (1879); *Cross Lake Club* v. *Louisiana*, 224 U. S. 632 (1912); *Kryger* v. *Wilson*, 242 U. S. 171 (1916). Clearly, for example, an attempt by the legislature to deny access to the writ of *mandamus* would violate Article I, Section 10 of the Constitution. See *Louisiana* v. *New Orleans*, 102 U. S. 203 (1880). The manner in which the courts might judicially limit the use of the writ of *mandamus*, therefore, has no bearing on the unconstitutionality of the composition statute as applied to appellants' bonds.

Attention should be directed to R. S. 52:27-38, heretofore quoted, which provides that no creditor whose claim shall be included in an approved composition shall bring suit to enforce his claim except with the permission of the Supreme Court and then only to enforce the rights given to him by the composition. A mere reading of the statute discloses that appellants could never secure the consent of the Supreme Court to this action, since it is based upon the bonds alleged to have been refunded under the plan adopted by appellee and is not brought to enforce rights given by the plan. The statute does not merely provide a stay of remedy for a limited period of time. It is *perpetual* in its terms and expressly deprives a holder of the only means of legal enforcement of his bonds on default. It is clearly unconstitutional under the authorities cited above. See *Louisiana* v. *Pilsbury*, 105 U. S. 278 (1881); *Borough of Fort Lee* v. *United States*, 104 F. (2d) 275 (C. C. A. 3rd, 1939).

Furthermore, since Section R. S. 52:27-37 of the act is clearly unconstitutional in that it makes the refunding plan

binding on non-assenting creditors and compels the acceptance of new obligations in place of the old, it cannot be doubted that the whole act must fall. The applicable rule was stated by the Court of Errors and Appeals of New Jersey in *Johnson* v. *State*, 59 N. J. L. 535 (E. & A. 1896), (at page 539):

> "It is undoubtedly elementary law that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand and that which is unconstitutional will be rejected; but if the different parts of the act are so intimately connected with and dependent upon each other as to warrant a belief that the legislature intended them as a whole, and that if all could not be carried into effect the legislature would not have passed the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent upon each other must fail."

Accord: *Dorchy* v. *Kansas*, 264 U. S. 286 (1924); *Lynch* v. *United States*, 292 U. S. 571 (1934); *Riccio* v. *Hoboken*, 69 N. J. L. 649 (E. & A. 1903); *Crater* v. *County of Somerset*, 123 N. J. L. 407, 411 (E. & A. 1939).

Applying this rule to the composition statute, it is clear that the very heart of the statute is the provision making compositions under the statute compulsory and that the legislature would never have enacted the law without it. It follows that the whole act falls and that R. S. 52:27-38 would therefore be invalid for this reason alone, were it not otherwise objectionable.

(b) The Composition Statute Cannot Be Sustained as an Emergency Measure under the Police Power.

Both the Court of Errors and Appeals and the appellee have laid great emphasis on the argument that the composition statute here involved is constitutional as emergency legislation under the police power of the state. The Court of Errors and Appeals relied on *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143 (E. & A. 1934) which case, in turn, rested upon the decision of this Court in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934).

It is clear that the present statute does not meet the tests required by the *Blaisdell* case for a valid exercise of the police power in the form of emergency legislation. In that case the Court sustained the validity of the Minnesota mortgage moratorium act, as against the claim that it impaired the obligation of contracts, holding that it was a proper exercise of the police power of the state in a period of public emergency. The legislation sustained, however, was temporary in operation, postponing mortgage foreclosure sales and extending the period of redemption for a limited period of time specified in the act upon the condition that the mortgagor pay a reasonable rental.

Chief Justice Hughes pointed out that the contracts clause of the Federal Constitution must be construed in harmony with the reserved police power of the state and that the existence of a public emergency might warrant an interference with contract rights under that power. He was careful to point out, however, that emergency does not

remove all constitutional restraints, stating (290 U. S. 398, at p. 439):

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. *This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.* But it does not follow that conditions may not arise in which a *temporary restraint* of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the State to protect the vital interests of the community."

In concluding that the statute was valid, the Court said (290 U. S. 389, at pp. 445, 447):

> "In view of the nature of the contracts in question—mortgages of unquestionable validity—the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency and could be granted only upon reasonable conditions.
>
> "The conditions upon which the period of redemption is extended do not appear to be unreasonable. * * * As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency

judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be, stand as they were under the prior law. The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.

* * *

"The legislation is temporary in operation. It is limited to the exigency which called it forth. While the postponement of the period of redemption from the foreclosure sale is to May 1, 1935, that period may be reduced by the order of the court under the statute, in case of a change in circumstances, and the operation of the statute itself could not validly outlast the emergency or be so extended as virtually to destroy the contracts."

The *Blaisdell* case, therefore, far from supporting appellee's position, demonstrates that the composition statute is invalid.

Subsequent decisions of this Court, considering the doctrine of the emergency powers, clearly show that a statute, such as this, which permanently destroys contract rights, cannot be sustained as an emergency measure under the police power.

In *W. B. Worthen Co.* v. *Thomas*, 292 U. S. 426 (1934), this Court held that a state statute exempting, without limitation or restriction, all moneys received under an insurance policy from liability for the payment of the debts of the recipient thereof was an unconstitutional impairment of contract obligations as applied to preexisting debts. It was argued that the act was valid as an emergency measure

under the *Blaisdell* case. Chief Justice Hughes, delivering the opinion of the Court, reviewed fully the effect of the decision in the *Blaisdell* case and concluded that the statute in question could not be sustained thereunder since not temporary in operation or reasonably limited to the emergency. He said (292 U. S. 426, at pp. 432-434):

> "The Legislature sought to justify the exemption by reference to the emergency which was found to exist. But the legislation was not limited to the emergency and set up no conditions apposite to emergency relief.
>
> "We held in *Home Building & Loan Asso.* v. *Blaisdell, supra*, pages 434, *et seq.*, that the constitutional prohibition against the impairment of the obligation of contracts did not make it impossible for the State, in the exercise of its essential reserved power, to protect the vital interests of its people. • • • But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.
> • • •
>
> "In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation, as here applied, to be a clear violation of the constitutional restriction."

In *W. B. Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 (1935), a statute revising the method of collecting delinquent taxes by extending for a period of years the time for redemption after a tax sale and reducing penalties for non-payment of taxes was held unconstitutional as an impairment of the obligation of contracts as applied to public improvement bonds issued prior to the enactment of the statute. The *Blaisdell* case was relied upon in support of the validity of the act which contained a declaration that the act was designed to meet an existing public emergency. As to this point, Mr. Justice Cardozo said (295 U. S. 56, at p. 63):

> "Upholders of the challenged acts appeal to the authority of *Home Building & Loan Asso.* v. *Blaisdell, supra*, the case of the Minnesota moratorium. There for a maximum term of two years, but in no event beyond the then existing emergency, a court was empowered, if there was a proper showing of necessity, to stay the foreclosure of a mortgage, but only upon prescribed conditions. 'The mortgagor during the extended period is not ousted from possession but he must pay the rental value of the premises as ascertained in judicial proceedings and this amount is applied to the carrying of the property and to interest upon the indebtedness.' 290 U. S. at p. 445. None of these restrictions nor anything approaching them, is present in this case. . . . Not Blaisdell's case, but Worthen's *W. B. Worthen Co.* v. *Thomas, supra*, supplies the applicable rule."

See also *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.*, 300 U. S. 124 (1937).

It should be noted that the doctrine of the *Blaisdell* case was well established when the Supreme Court of the United States held in the Federal Municipal Bankruptcy Act cases (*Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513 (1936) and *United States* v. *Bekins*, 304 U. S. 27 (1938)) that a compulsory state municipal bankruptcy act such as that here involved is unconstitutional as impairing the obligation of contracts if applied to preexisting obligations.

Prior to the present case, New Jersey had accorded full support to the doctrine of the United States Supreme Court cases. See *Vanderbilt Trustee in Liquidation* v. *Brunton Piano Co.*, 111 N. J. L. 596 (E. & A. 1933); *Fidelity Union Trust Co.* v. *Bryant*, 14 N. J. Misc. 243 (Sup. 1936); *State ex rel. Phelps* v. *Fort Lee*, 14 N. J. Misc. 895 (Sup. 1936). Even the case of *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143 (E. & A. 1934) lends no support to the appellee's contentions.

In the latter case, the Court of Errors and Appeals of New Jersey, by a seven to six vote, upheld the constitutionality of the stay provisions of the Municipal Finance Act, R. S. 52:27-32.1 and 33 as emergency measures under the police power. The case did not involve a refunding plan. The composition features of the statute were not involved and, in fact, were not even enacted at the time of the argument in the *Hourigan* case. The stay provisions there sustained were limited in duration to the period when the Municipal Finance Commission was operating in the community and a substituted remedy was given during that time. But it is doubtful that even the stay provisions of the statute can constitutionally be sustained as reasonable emer-

gency measures. Other courts, in similar situations, have taken a contrary view. See *Borough of Fort Lee* v. *United States*, 104 F. (2d) 275 (C. C. A. 3rd, 1939); *Sovereign Camp. W. O. W.* v. *Wilentz*, 23 F. Supp. 23 (D. C. N. J., 1938), *appeal dismissed*, 306 U. S. 573 (1939); *Waterville Realty Corp.* v. *City of Eastport*, 136 Me. 309 (1939).

In view of the rulings of this Court it is obvious that the composition statute cannot be sustained as an emergency act under the police power. It provides for a compulsory, *perpetual* prevention of the enforcement of appellants' obligations now long due and for the forced substitution of new and different obligations in their stead not enforcible for many years. These, certainly, are not reasonable conditions appropriate to an emergency and the statute must therefore be held to be an unconstitutional impairment of the obligation of contracts.

One further point should be noted in this connection. Even if the Court should determine that the composition statute was a reasonable emergency measure when enacted, the act cannot now be sustained if the emergency has passed. It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934).

It is to be noted that the Municipal Finance Commission ceased to function in Asbury Park on December 10, 1938, only a few months after the adoption of the refunding plan here involved and long prior to the institution of the suit at bar. No municipality other than Asbury Park has adopted a plan under the statute. The composition statute as enacted (P. L. 1933, c. 331, p. 866) contains no

declaration of public emergency which is stated to require a bankruptcy act of this nature. The statement of the Supreme Judicial Court of Maine in *Waterville Realty Corp. v. City of Eastport*, 136 Me. 309 (1939), which held unconstitutional the staying of suits against a municipality while the Municipal Finance Commission was functioning therein, is therefore pertinent (136 Me. 309, at p. 319):

> "• • • The entitling of the act as one 'Creating a Board of Emergency Municipal Finance', without expression of facts in a preamble constituting a public emergency, does not compel a conclusion that there was a public emergency rather than one solely private affecting, for instance, only certain municipalities. We do not take judicial notice of the fact that more than a very few cities and towns in this state were so badly involved financially when this statute was enacted that there was 'an urgent public need' for the enactment of such legislation.
>
> "But assuming a public emergency then to have existed, there is nothing in this record to show, nor do we take judicial notice of the fact, that such an emergency had not ceased when this action was brought. Did we validate this act as public emergency legislation, it could have efficacy only as long as such an emergency continued. *Home Building & Loan Asso.* v. *Blaisdell*, supra."

It is therefore submitted that the composition statute is void as an unconstitutional impairment of the obligation of contracts. It follows that the refunding plan adopted by the City of Asbury Park cannot be held binding upon appellants who have not consented thereto. It also follows that it is no defense to this action that appellants have failed to secure the permission of the New Jersey Su-

preme Court to the institution of this suit as required by R. S. 52:27-38. Since that section of the statute is invalid, the order of the Supreme Court retaining jurisdiction over further proceedings in connection with the plan is a nullity, *State* v. *Guida*, 119 N. J. L. 464 (E. & A. 1938); *In re Rose*, 122 N. J. L. 507 (Sup. 1939); *Central R. R. Co.* v. *State Board of Assessors*, 75 N. J. L. 771 (E. & A. 1908), and neither the requirements of the statute nor the order of the Court can be held to impose conditions upon appellants' right to sue.

It is obvious, therefore, that the Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint and in so doing infringed the constitutional rights of appellants under Article I, Section 10 of the Constitution of the United States.

POINT II.

The Court of Errors and Appeals of New Jersey erred in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) being a compulsory composition statute, is unconstitutional in that it deprives appellants of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The rights acquired by the appellants upon purchase of their bonds were contract rights and vested in nature.

Lynch v. *United States,* 292 U. S. 571 (1934). Appellants were entitled to be paid upon the dates stipulated and in full, including interest at the rates provided. Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, as construed by the Court of Errors and Appeals of New Jersey, denies to appellants the rights acquired at the time of the making of their contracts and endeavors to substitute an obligation entirely different in nature without the consent of the appellants. It not only materially alters the methods of enforcement but changes the terms of the obligation itself. It seeks to require both the acceptance of new bonds maturing in 1966 and of interest rates far lower in amount.

The denial of a vested right under a contract, by a statute subsequently enacted, is a deprivation of property without due process of law. The statute here involved, therefore, not only impairs the obligation of appellants' contracts in violation of Article I, Section 10 of the Constitution of the United States, but deprives appellants of their property without due process of law, in violation of the 14th Amendment to the Constitution of the United States. *Lynch* v. *United States,* 292 U. S. 571 (1934); *Bradley* v. *Lightcap,* 195 U. S. 1 (1904); *Houston and Texas Central Railway Company* v. *Texas,* 170 U. S. 243 (1898); 12 Am. Jur., Constitutional Law, § 657.

Conclusion.

In concluding, it should be pointed out that the Asbury Park refunding plan will not be upset if appellants prevail in this appeal. A holding that the composition statute is invalid and that the plan is not binding upon appellants cannot in any way impair the integrity of the refunding bonds which have been issued in the past or may be issued in the future to assenting bondholders. The validity of these bonds in no way depends upon the composition statute, which merely deals with the question as to whether non-assenting bondholders may be compelled to accept the new bonds in place of the old. The new bonds were issued under the authority of other provisions of the Municipal Finance Commission Act of undoubted constitutionality (R. S. 52:27-14 to 24, inclusive), and are clearly valid obligations of the City. Moreover, as appears from appellee's affidavits filed in this cause, the vast majority of the bondholders of the City of Asbury Park have consented to the refunding plan and accepted the new bonds. (R. 10, 61) Since they have so consented, they may not now or later challenge the validity of the new bonds or the refunding plan in any way. *Shepherd* v. *Mount Vernon Trust Co.*, 269 N. Y. 234 (1935); *In re City of West Palm Beach, Fla.*, 96 F. (2d) 85 (C. C. A. 5th, 1938).

Further, a decision of this Court in favor of the appellants can have little, if any, effect on state refunding plans throughout the nation. The passage of federal legislation upon the subject has terminated the utilization of such plans under state municipal insolvency statutes.

For the reasons herein urged, it is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey, affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, should be reversed.

Respectfully submitted,

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APPENDIX.

Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey.

52:27-34. **Petition by creditors; plan of adjustment or composition; parties; notice.** Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.

The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.

Source, L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-35. **Allegations in petition.** In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors

affected thereby, and is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-36. **Approval by supreme court justice of plan of adjustment or composition; findings.** In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 2, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-37. **Approved plan binding on all creditors; substituted obligations.** The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations,

or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

Source. L. 1933, c. 331, § 3, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-38. **Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted.** After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

Source. L. 1933, c. 331, § 4, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-39. **Reduction in principal of outstanding notes or bonds prohibited.** Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality.

Source. L. 1933, c. 331, § 5, p. 868, suppl. to L. 1931, c. 340, p. 830.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

REPLY BRIEF OF APPELLANTS.

ARTHUR T. VANDERBILT,
Attorney of Appellants.

On the Brief:
G. DIXON SPEAKMAN,
H. ALLEN LOCHNER.

Newark, N. J.,
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FEDERAL CONSTITUTION.

Article I, Section 10 2

NEW JERSEY STATUTES.

Revised Statutes, Title 52, Chapter 27 2

Revised Statutes, Title 52, Chapter 27, Article 7 2

R. S. 52:27-32.1 and 33 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

REPLY BRIEF FOR APPELLANTS.

I.

Reply to Point I of Appellee's Brief.

In Point I of its brief, the appellee attempts to sustain the constitutionality of the compulsory composition statute here involved, construed so as to apply to pre-existing municipal obligations, on the ground that it was a valid exercise of the police power of the state and, as such, did not impair the obligation of contracts in violation of

Article I, Section 10, of the Constitution of the United States.

The complete fallacy of appellee's position has been demonstrated in appellants' original brief. In the main, therefore, it will suffice to point out the inapplicability of the cases cited by appellee in Point I of his brief.

Initially, note should be taken of the fact that appellee's title heading under Point I tends to confuse an otherwise clear issue. According to the title, appellee purports to contend that not only Article 7 of Chapter 27 of Title 52 of the Revised Statutes, the compulsory composition provisions, but Chapter 27 of Title 52 in its entirety is constitutional. No issues are raised in the present case as to the constitutionality of any portion of Chapter 27 other than Article 7 thereof.

Apparently, it is appellee's confusion in this matter, that has led him to rely on *Hourigan* v. *North Bergen Township,* 113 N. J. L. 143 (E. & A. 1934). While that case, in any event, could not constitute a binding authority in this Court, it will perhaps be permissible to show its inapplicability to the issues now in suit.

In the *Hourigan* case, the Court of Errors and Appeals of New Jersey, by a seven to six vote, upheld the constitutionality of the stay provisions of the Municipal Finance Act, R. S. 52:27-32.1 and 33. R. S. 52:27-32.1 provides that the enforcement of judgments against municipalities on their obligations shall be stayed so long as the Municipal Finance Commission shall function therein unless consent to such enforcement is obtained from the New Jersey Supreme Court or a justice thereof. R. S. 52:27-33 provides that, so long as the Commission shall function therein, no proceeding may be brought to compel a municipality to assess, levy or collect taxes, except that the New Jersey

Supreme Court or a justice thereof, may authorize one or more creditors, suing on behalf of all other creditors, to bring such an action. The Court held that these stay provisions were constitutional as emergency measures under the police power of the state to permit financially embarrassed municipalities to continue to perform essential governmental functions.

Appellee is apparently under the impression that the Court of Errors and Appeals passed upon the constitutionality of the composition statute here in question in the *Hourigan* case. A reading of the Court's opinion clearly demonstrates that this is not so, for the composition statute is nowhere mentioned or referred to. The sole issue before the Court was the validity of the stay provisions above referred to and Mr. Justice Heher pointed out in the opinion (113 N. J. L. 143, at 148) that those were the sections to be passed upon. Since the case did not in any way involve a refunding plan, it is impossible that the provisions of the composition statute were at issue. Indeed, the opinion of the Supreme Court in the *Hourigan* case (11 N. J. Misc. R. 194) shows that the matter was argued before it on October 5, 1932, many months before the enactment of the composition statute, which became law on June 27, 1933 (P. L. 1933, c. 331, p. 866). It is obvious, therefore, that the appellee cannot rely on the *Hourigan* case as declaring the constitutionality of the composition provisions.

The *Hourigan* case is in no way an authority in support of the constitutionality of the composition statute. The stay provisions there sustained did not deprive creditors of their rights forever; they were limited in duration to the period when the Municipal Finance Commission was operating in the community and a substituted remedy was given during that time. The Court clearly regarded the statutes there upheld as merely imposing a temporary

stay while the Commission performed its functions in the municipality, similar to those of a receiver of an insolvent corporation. Great reliance was placed upon the then recent case of *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934) and the doctrine of emergency powers there set forth and it is clear that the Court deemed that the challenged statutes were a reasonable exercise of those powers since they provided a temporary rather than a permanent restraint.

Nothing in the *Hourigan* case, therefore, can be taken as in the slightest degree approving the constitutionality of the compulsory composition act here involved. The stays therein sustained as reasonable emergency measures were limited in duration to the emergency giving rise thereto and former rights were revested at the end of the period of emergency. There are obvious differences between those statutes and the act here in question which seeks to wipe out pre-existing rights forever.

Though the *Hourigan* case is manifestly inapplicable, it might be noted that even as to the proposition for which it stands—the constitutionality of the stay provisions—the decision is contrary to authority. In *Borough of Fort Lee* v. *United States*, 104 F. (2d) 275 (C. C. A. 3rd, 1939), the Court of Appeals for the Third Circuit unanimously held that the *same* stay provisions violated the obligation of contracts and were therefore void. A similar decision was made in *Sovereign Camp W. O. W.* v. *Wilentz*, 23 F. Supp. 23 (D. C. N. J., 1938), *appeal dismissed*, 306 U. S. 573 (1939). And in the case of *Waterville Realty Corp.* v. *City of Eastport*, 136 Me. 309 (1939), the Supreme Judicial Court of Maine held unconstitutional the same type of stay provisions as were sustained in the *Hourigan* case, finding that they were not reasonable emergency measures and therefore impaired the obligation of contracts.

Appellee, in Point I of his brief, also relies on *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934). Appellants have fully discussed the *Blaisdell* case at page 30 *et seq.* of their original brief. Further comment is unnecessary other than to reiterate that not only does the *Blaisdell* case fail to support the appellee's contentions, but it conclusively demonstrates the unconstitutionality of the composition statute as applied to pre-existing obligations.

Block v. *Hirsh*, 256 U. S. 135 (1921), cited by appellee under Point I, is obviously not in point. The case involved the unsual situation created by the housing shortage in the District of Columbia during the first World War. To remedy the condition, a statute was passed giving tenants the right to continue to occupy rental properties after the expiration of their terms, subject to regulation by a commission, so long as such tenants paid their rents and performed the conditions of their leases. The statute recited the emergency created by the war, and declared that the statute would terminate in two years unless sooner repealed. The extreme situation, it was held, clothed the rental of buildings in the District with a public interest which justified a temporary control by proper regulation. Obviously, the facts of the *Block* case are so at variance with those of the instant case that even a comparison of the cases is precluded.

Equally beside the point are the Gold Clause cases, *Norman* v. *B. & O. R. Co.*, 294 U. S. 240 (1935); *Nortz* v. *United States*, 294 U. S. 317 (1935); and *Perry* v. *United States*, 294 U. S. 330 (1935).

In the *Norman* case the validity of a Joint Resolution of Congress nullifying the provisions in private contracts purporting to give the obligee a right to require payment in gold or a particular kind of coin or currency was founded

on the constitutional power of Congress to regulate the value of money. Conceding the existence of that power, it was obvious that provisions of private contracts could not interfere with the exercise of that power. It is a far cry from such a ruling to the instant case, where a state enactment, instead of being supported by a constitutional sanction, is confronted by an express constitutional prohibition of such enactment.

In *Nortz* v. *United States, supra,* the plaintiff was the owner of gold certificates of the nominal amount of $106,300. He brought suit alleging that the United States had certified that $106,300 in gold coin would be paid to him on demand; that at the time of issuance a dollar in gold consisted of 25.8 grains, .9 fine; that on January 17, 1934 he presented the certificates; that on that date an ounce of gold was worth $33.43 and he was therefore entitled to receive in redemption $170,634.07; that because of the order of January 15, 1934 requiring all persons to pay over to the United States gold certificates owned by them in return for an equivalent amount of other coin or currency, plaintiff delivered the certificates under protest, and received currency in the sum of $106,300 and not redeemable in gold. It was held for defendant on the ground that plaintiff had received all to which he was entitled and could therefore show no damages, since after the order of January 15, 1934 there was no market for gold or gold certificates. Clearly, the case has no bearing whatever on the issues here involved.

Of the same nature was *Perry* v. *United States, supra.* There, the Joint Resolution of June 5, 1933 was again under attack by an owner of a United States bond, issued in 1918, providing that it was payable in "United States gold coin of the present standard of value." Though plaintiff was denied recovery on the ground that he could

show no damages since Congress had withdrawn gold and gold certificates from circulation, the Resolution was declared unconstitutional as applied to government bonds. The Court refused to sanction a repudiation of the public obligation. Though the case is not in point, it suggests the parallel in the present case where, in effect, a repudiation of a public debt has been attempted.

In *Hudson Water Co.* v. *McCarter*, 209 U. S. 349 (1908), cited by appellee in Point I, the defendant had contracted to furnish water, taken from the Passaic River in New Jersey, to municipalities in New York. The State of New Jersey, reciting the need for preserving fresh water for the health of its citizens, then enacted that it should be unlawful to carry water of New Jersey streams into any other state. The defendant was enjoined from so doing by the New Jersey courts on the ground that he was a riparian proprietor and as such had no right to divert waters for more than a reasonable distance and for other than ordinary uses. The residuum of public ownership in the waters was also relied upon. This Court, in affirming, did not disagree with the reasons advanced by the courts below but preferred to rest its decision on the broader ground that the state has a particular interest in protecting its waters in substantially undiminished form and that private contracts cannot interfere with this paramount interest. The contract, in the Court's view, was illegal when made. This is indicated by the sentence from the opinion directly following the quotation given in the appellee's brief. Thus, the Court states (209 U. S. at p. 357):

> "The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, §10, needs but a few words more. One whose rights, such as they are, are subject to state restrictions, cannot remove them from the power of

> the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.' *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, 438; *Manigault* v. *Springs*, 199 U. S. 473, 480. *But the contract, the execution of which is sought to be prevented here, was illegal when it was made"* (italics ours).

Nothing further need be said to distinguish the *McCarter* case.

A considerable portion of Point I of appellee's brief is devoted to a discussion of cases involving building and loan association legislation. The cases cited are *Bucsi* v. *Longworth B. & L. Assn.*, 119 N. J. L. 120 (E. & A. 1937); *Veix* v. *Sixth Ward Bldg. & Loan Asso. of Newark;* 123 N. J. L. 356 (E. & A. 1939), *aff'd.*, 310 U. S. 32 (1940); and *Veix* v. *Seneca Building and Loan Assn.*, 126 N. J. L. 314 (E. & A. 1941).

The cases may be disposed of as a group. All involved the endeavors of shareholders of building and loan associations to withdraw and be reimbursed for their shares in the order in which notice of withdrawal was given, as they were permitted to do by legislation in effect when they became members, in the face of subsequent legislation which established priority of payment to holders of matured shares, and which required shareholders to accept pro rata payment regardless of the order of the withdrawal notices when ample funds were not at hand. The legislation was upheld, the courts recognizing the fact that building and loan associations are businesses of a special nature, peculiarly subject to legislative regulation. Such associations have always been regulated in minute detail under the police power, and contracts made in connection therewith must be deemed subject to such control. As Mr. Justice Reed succinctly

phrased it in *Veix v. Sixth Ward Bldg. & Loan Asso. of Newark, supra,* (310 U.S. at p. 38):

> "It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."

In other words, withdrawal rights in building and loan associations, having always been governed by statute, are subject to change by the legislature under its police power. The courts have pointed out that this power to change is analogous to the reserved power to amend corporate charters and that shareholders acquired their shares subject to the power to change the existing law. The composition statute here involved cannot be sustained on this theory. The rights of which appellants have been deprived are rights given by the express terms of the contract and not by statute. The amount and time of payment as agreed upon have been changed and all remedy to enforce the contract is denied. It is clear that there is no reserved power to make such changes in appellants' contracts. Manifestly, therefore, an altogether different set of principles are applicable to building and loan associations than are applicable to compulsory composition statutes. The latter principles are to be sought in the cases involving composition statutes and not in building and loan law.

Further, the legislation sustained in the building and loan cases merely provided for a change in the statutory method of enforcing withdrawal rights and did not have the effect of repudiating the contract of the shareholder. The law merely provided for a stay in the enforcement of these rights and the stay, being directly dependent for its duration upon the financial status of the association, was

limited to the emergency giving rise to the statute. There was no change in the amount to be paid to the shareholders and no variation of the terms of the obligation as entered into between the parties. In *Rocker* v. *Cardinal Building & Loan Assn.*, 13 N. J. Misc. 397 (Sup. 1935), *aff'd.*, 119 N. J. L. 134 (E. & A. 1937), the Court specifically so stated (13 N. J. Misc. at p. 403):

> "'The 1932 amendment of section 52 (the subsequent legislation involved in the building and loan cases) does not reduce the amount of plaintiff's monetary interest in the defendant association. It is true that it provides a different scheme for the payment of withdrawals than that provided by the section which it amends, but the statutory changes merely related to the *time*, and not the *quantum*, of payment" (Italics ours).

In *Gelfert* v. *National City Bank*, 313 U. S. 221 (1941), cited under Point I of appellee's brief, this Court, reversing a decision of the New York Court of Appeals, held that a New York statute, applicable generally and not limited to any declared public emergency, which provides in substance that in determining the amount of a deficiency judgment on the foreclosure of a mortgage, the court shall fix the "fair and reasonable market value" of the property and shall deduct from the amount of the debt either such market value or the sales price of the property, whichever is the higher, is not, at least in a case where the mortgagee purchases the property at the sale, an unconstitutional impairment of contract obligations in violation of the Federal Constitution, as applied to a mortgage executed before the enactment of the statute.

The *Gelfert* case is in no way contrary to appellants' position. As in the building and loan cases, so there, the statute did not alter the terms of the contract entered into

between the parties. It merely changed the procedure to be followed in foreclosing mortgages, a matter already governed by statutory enactment. The Court pointed out in its opinion that courts of equity and legislatures have long exercised control over judicial sales to prevent discrimination. Although the Court held that it was not essential to the validity of the statute that it be addressed to a declared public emergency, it recognized that the statute was directed to the emergency caused by economic depression and that it was reasonably adapted to that end, operating to upset the actual sales price as the factor in determining the amount of deficiency only when real estate values were so depressed as to render the price realized at public sale an inadequate test of value actually received by a mortgagee who buys in. The statute was sustained, not on the ground that there was a justifiable deprivation of a contract right, but rather on the theory that a mortgagee receives payment in full thereunder and has no contract right to a double satisfaction of his debt.

Mr. Justice Douglas, writing for the Court, said (313 U. S. at p. 232):

> "We mention these matters here because they indicate that for about two centuries there has been a rather continuous effort, either through general rule or by appeal to the chancellor in specific cases, to prevent the machinery of judicial sales from becoming an instrument of oppression. . . ."

Continuing (313 U. S. at p. 233):

> "Underlying that change has been the realization that the price which properly commands at a forced sale may be hardly even a rough measure of its value. The paralysis of real estate markets during periods of depression, the wide discrepancy between the

money value of property to the mortgagee and the cash price which that property would receive at a forced sale, the fact that the price realized at such a sale may be a far cry from the price at which the property would be sold to a willing buyer by a willing seller, reflect the considerations which have motivated departures from the theory that competitive bidding in this field amply protects the debtor.

"*Mortgagees are constitutionally entitled to no more than payment in full. Honeyman* v. *Jacobs, supra.* They cannot be heard to complain on constitutional grounds if the legislature takes steps to see to it that they get no more than that. As we have seen, equity will intervene in individual cases where it is palpably apparent that gross unfairness is imminent. That is the law of New York. 284 N. Y. 13, 20; 29 N. E. (2d) 449. And see *Fisher* v. *Hersey*, 78 N. Y. 387. But there is no constitutional reason why in lieu of the more restricted control by a court of equity the legislature cannot substitute a uniform comprehensive rule designed to reduce or to avoid, in the run of cases, the chance that the mortgagee will be paid more than once. Cf. *Suring State Bank* v. *Giese*, 210 Wis. 489; 246 N. W. 556. *Certainly under this statute it cannot be said that more than that was attempted.*" * * *

And (313 U. S. at p. 234):

> "*To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. Honeyman* v. *Jacobs, supra. The contract clause does not protect such a strategical, procedural advantage.*" (Italics ours.)

The conclusion follows, therefore, that the *Gelfert* case may not be relied upon to sustain the composition statute

here involved. The composition statute does not merely change the statutory procedure to be followed in enforcing contract rights, nor does it seek to limit appellants to a recovery of that to which their contracts actually entitle them. It alters the very terms of the obligations entered into between the parties, changing both the amount and time of payment, and permanently deprives appellants of all remedy to enforce their contracts.

II.

Reply to Appellee's Conclusion.

Appellee in his conclusion claims that the United States District Court did not pass on the constitutionality of the legislation under discussion in *Sovereign Camp, W. O. W.* v. *Wilentz*, 23 F. Supp. 23 (D. C. N. J. 1938), *appeal dismissed*, 306 U. S. 573 (1939). Reference to the case itself should suffice to establish that the case fully supports the proposition for which appellants cited it, namely, that the stay provisions of the New Jersey Municipal Finance Commission Act were there declared unconstitutional.

Nothing in the record supports the predictions of the appellee as to the results which would follow from a judgment for appellants in this case. It is beyond question of doubt that bondholders who have consented to the refunding plan involved in the present case cannot now question the validity of the new bonds or of the refunding plan in any way. *Shepherd* v. *Mount Vernon Trust Co.*, 269 N. Y. 234 (1935); *In re City of West Palm Beach, Fla.*, 96 F. (2d) 85 (C. C. A. 5th, 1938).

Appellants, therefore, again respectfully submit that the judgment of the Court of Errors and Appeals of New Jersey, affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, should be reversed.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney of Appellants.

On the Brief:
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IN THE

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OCTOBER TERM, 1941.

No. 896.

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Appellee.

On Appeal from the Court of Errors and Appeals of New Jersey.

SUPPLEMENT FILED BY APPELLANTS.

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SUPPLEMENT FILED BY APPELLANTS.

Pursuant to the instructions given by the Court at the conclusion of the argument yesterday, appellants submit herewith the New Jersey statutes which give consent to municipalities of New Jersey to avail themselves of the provisions of the Federal Municipal Bankruptcy Acts. A brief statement concerning the history of these statutes will, it is thought, aid the Court in understanding the manner in which they are set forth herein.

After the First Municipal Bankruptcy Act (subsequently held invalid by this Court in *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S.

513) was enacted by the Congress in 1934, the legislature of New Jersey in 1935 passed three acts authorizing municipalities of New Jersey to avail themselves of the provisions of the Federal Act. These three Acts, Chapters 190, 193 and 313 of the Laws of 1935, are set forth herein and designated as follows:

Appendix A, Chapter 190, Laws of 1935
Appendix B, Chapter 193, Laws of 1935
Appendix C, Chapter 313, Laws of 1935.

In 1937, there was a general revision of all of the laws of New Jersey and the three 1935 acts above referred to were consolidated in the Revised Statutes as R. S. 52:27-40 to 45, inclusive. This consolidation is set forth herein as Appendix D.

After the Second Municipal Bankruptcy Act was enacted by the Congress in 1937 and sustained by this Court in *United States* v. *Bekins*, 304 U. S. 27, the legislature of New Jersey in 1938 amended the provisions of R. S. 57:27-40, 42 and 44 to permit municipalities of New Jersey to avail themselves of the new Bankruptcy Act and of any amendments or supplements thereto. The amendment of 1938 is set forth herein as Appendix E.

It will be noted upon examination of these statutes that the State of New Jersey has given to all municipalities generally the right to avail themselves of the Bankruptcy Act subject to the approval of the Municipal Finance Commission. The necessity of obtaining the approval of the Municipal Finance Commission does not, it is submitted, destroy the consent given, nor does it make the Act anything other than general in its scope.

These statutes clearly sustain the statements at the argument that New Jersey has given consent to municipalities to

avail themselves of the Federal Act. Clearly since May 1938, when the 1938 amendment became effective, any municipality of New Jersey with the consent of the Municipal Finance Commission could and can avail itself of the Federal Act held constitutional by this Court in April 1938 in the *Bekins* case.

Appellants would like to point out, however, that in their view of the case the New Jersey composition statute, challenged by this appeal, is unconstitutional as applied to appellants, irrespective of the question of whether New Jersey has given consent to municipalities to avail themselves of the Federal statute.

It is clear from the cases cited in appellants' main brief that no state has the power directly or under the guise of a composition or bankruptcy act to abridge a pre-existing contractual obligation. Since the Constitution denies to every state this power, no state can acquire the power by merely refusing to give its consent to municipalities to avail themselves of a valid Federal law. As stated by Chief Justice Hughes in the *Bekins* case, "It lies in the right of the state to oppose Federal interference", but when the state gives its consent Chief Justice Hughes very aptly said that in that case "The state steps in to remove that obstacle. The state acts in aid and not in derogation of its sovereign powers. It invites the interference of the bankruptcy powers to save its agency which the state itself is powerless to rescue".

If this were not so, there would have been no occasion for the Congress to enact the Second Municipal Bankruptcy Act after the first act was held unconstitutional. Certainly if this were not so, there would have been no occasion for the states to urge the adoption of the second act and through their respective attorneys general to argue

in favor of its constitutionality before this Court. It is clear, therefore, that a state may prevent all municipal bankruptcies by refusing to give permission to municipalities to avail themselves of the Federal Act, but they cannot by such refusal create in themselves the power to enact bankruptcy laws applicable to pre-existing obligations.

These New Jersey statutes, while they cannot affect the constitutionality of the composition statute here challenged, do show that any municipality of New Jersey, including appellee, could proceed with the consent of the Municipal Finance Commission under the Federal Act.

In conclusion, it is submitted that, entirely aside from any question of Federal legislation concerning municipal bankruptcies and a state consenting or not consenting thereto, no state has the power to enact bankruptcy or composition statutes abridging pre-existing obligations such as those involved in the present controversy. The unbroken line of authorities construing the contract clause of the Federal Constitution, referred to in appellants' main brief, pages 16-29, commencing with *Sturges* v. *Crowinshield*, 4 Wheat. 122 (1819) down to *United States* v. *Bekins*, 304 U. S. 27 (1938), so holds. The appellee cites no cases in his brief and at the oral argument could refer the Court to no cases where a state bankruptcy or composition statute abridging pre-existing contracts has been sustained by this Court or by the Courts of New Jersey except the present case.

Respectfully submitted,

ARTHUR T. VANDERBILT,
Attorney of Appellants.

Appendix A.

CHAPTER 190

AN ACT to supplement an act entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever, pursuant to the act to which this act is a supplement, the Municipal Finance Commission, hereinafter sometimes referred to as the "commission" shall function in any municipality, any such municipality may file a petition with any United States court of bankruptcy under an act of the Congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplemental thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four, for the purpose of effecting a readjustment of its debts. No such petition nor any plan of readjustment in connection therewith shall be filed with the court by any municipality, however, unless the same shall be accompanied by the written approval of the commission, and no plan of readjustment shall be put into temporary effect or finally confirmed without the written approval of the commission of such plan. The municipality shall give the commission at least ten days notice in writing of all hearings and other proceedings before the court of bankruptcy or any special master in connection with any such petition or plan of readjustment.

2. The commission shall have power in its discretion to give its written approval of any petition proposed to be filed

by any municipality hereunder and of any plan of readjustment of its debt filed with or in proceedings upon such petition; *provided, however,* that notwithstanding any provision of this act, the commission shall not approve any plan of readjustment which provides for the reduction in the principal amount of any outstanding notes or bonds of such municipality.

3. This act shall take effect immediately.

Approved May 15, 1935.

Appendix B.

CHAPTER 193

AN ACT concerning the financial difficulties of counties, municipalities, school districts, or other political subdivisions of this State.

WHEREAS, By an act of the Congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four, the Congress of the United States has undertaken the further exercise of the bankruptcy powers because of the national emergency caused by increased financial difficulties of many local governmental units; and

WHEREAS, Pursuant to said act of the Congress of the United States divers counties, municipalities, school districts or other political subdivisions of this State may desire to effect a readjustment of their debts and to procure the discharge of debts and liabilities provided for in said act; and

WHEREAS, Public and recorded confession that it is insolvent or unable to meet its debts as they mature must be made by any county, municipality, school district or other political subdivision desiring to take action under said act of the Congress of the United States; and

WHEREAS, Said act of the Congress of the United States reserves to the State the power to control the actions of its counties, municipalities, school districts or other political subdivisions under said act; now, therefore,

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Any county, municipality, school district or other political subdivision of this State (hereinafter referred to

as "political subdivision") shall have power to file a petition or petitions with any United States court or court in bankruptcy under an act of the congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four (hereinafter referred to as the "municipal bankruptcy act"), for the purpose of effecting a readjustment of its debt. Such petition or petitions shall not be so filed unless the approval of the municipal finance commission constituted by section one hundred two of an act of the Legislature of the State of New Jersey entitled "An act concerning municipal finances," approved April twenty-eighth, one thousand nine hundred and thirty-one, constituting chapter three hundred forty of the laws of one thousand nine hundred and thirty-one, as amended and supplemented, which is hereby constituted a commission for the purposes of this act, be first had and obtained.

2. The filing of such petition shall be authorized only by ordinance of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, except that in the case of a county or of a school district governed by the provisions of article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three, as amended and supplemented, such filing shall be authorized by resolution of the governing body adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body. For the purposes of this act the board of education of a school district governed by the provisions of article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and

management thereof," approved October nineteenth, one thousand nine hundred and three, as amended and supplemented, shall be deemed to be the "governing body" of such school district.

3. No plan of readjustment filed with or in the proceedings upon any such petition shall be approved by the court or put into temporary effect or finally confirmed without the approval of the municipal finance commission.

4. The municipal finance commission shall have power in its discretion to give its approval in the manner provided by this act to the filing of any petition for the purpose of effecting readjustment of its debt which any political subdivision proposes to file, and of any plan of readjustment filed with or in the proceedings upon any such petition; *provided, however,* that no such plan of readjustment shall provide for the reduction of the principal amount of any outstanding notes or bonds of the political subdivision or for the payment of fees, compensation, reimbursement or other allowances for attorneys, agents, committees, or other representatives of creditors of the political subdivision.

5. Upon the final confirmation of any plan of readjustment approved by the municipal finance commission, the political subdivision assenting to such plan of readjustment shall have power, by ordinance in the case of a municipality, by resolution in the case of a county, and by resolution of the board of education in the case of a school district governed by the provisions of article VII of an act entitled "An act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof," approved October nineteenth, one thousand nine hundred and three, as amended and supplemented to authorize, issue, sell and deliver such bonds, notes or other obligations and enter into such agreements and do such other acts and things as may be required of it pursuant to said plan of readjustment. The full faith and credit of the political subdivision shall be deemed to be pledged for the payment of such notes, bonds or other obligations. Such ordinance or resolution, as the case may

be, shall not take effect until approval by the municipal finance commission, and shall provide for the issuance of bonds in one or more series, bearing such date or dates, maturing at such time or times, bearing interest at such rate or rates of interest, not exceeding six per centum (6%) per annum, payable at such time or times, in such denominations, in such form, either coupon or registered, carrying such registration privileges, payable in such medium of payment at such place or places, subject to such terms of redemption, with or without premium, as the municipal finance commission may approve.

6. The approval of any petition, plan of readjustment or other papers to be filed in any United States court or court in bankruptcy, or of any ordinance or resolution shall be requested by filing in the office of the municipal finance commission a certified copy of a resolution of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, requesting such approval, together with a true and correct transcript duly certified of any proceedings relating to such petition, plan of readjustment, other papers, ordinance or resolution, and the authorization thereof, accompanied by, in the case of documents to be filed in the United States court or court in bankruptcy, the original and one certified copy of such documents, and in the case of an ordinance or resolution, two certified copies of such ordinance or resolution. The approval of the municipal finance commission under this act of any petition, plan of readjustment or other papers filed or to be filed in a United States court or court in bankruptcy, shall be evidenced only by written endorsement thereof on the petition, plan of readjustment or other papers so filed and the approval of the municipal finance commission under this act of any ordinance or resolution of the governing body of any political subdivision shall be evidenced only by written endorsement thereof on a certified copy of such ordinance or resolution.

7. This act shall take effect immediately.

Approved May 15, 1935.

Appendix C.

CHAPTER 313

AN ACT to amend an act entitled "An act concerning the financial difficulties of counties, municipalities, school districts, or other political subdivisions of this State," approved May fifteenth, one thousand nine hundred thirty-five, constituting chapter one hundred ninety-three of the laws of one thousand nine hundred thirty-five.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section four of the act to which this act is an amendment be and it hereby is amended to read as follows:

4. The municipal finance commission shall have power in its discretion to give its approval in the manner provided by this act to the filing of any petition for the purpose of effecting readjustment of its debt which any political subdivision proposes to file, and of any plan of readjustment filed with or in the proceedings upon any such petition; *provided, however,* that no such plan of readjustment shall provide for the reduction of the principal amount of any outstanding notes or bonds of the political subdivision nor, without the express approval in writing of the municipal finance commission, for the payment of fees, compensation, reimbursement or other allowances for attorneys, agents, committees, or other representatives of creditors of the political subdivision.

2. This act shall take effect immediately.

Approved June 29, 1935.

Appendix D.

Article 8. Readjustment of Debts Under Federal Municipal Bankruptcy Act.

52:27–40. Filing of petition by political subdivision; approval of commission. Any county, municipality, school district or other political subdivision of this state, hereinafter in this article referred to as "political subdivision", shall have power to file a petition or petitions with any United States court or court in bankruptcy under an act of the congress of the United States entitled "An act to amend an act entitled 'An act to establish a uniform system of bankruptcy throughout the United States,' approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto," approved May twenty-fourth, one thousand nine hundred and thirty-four, hereinafter in this article referred to as the "municipal bankruptcy act", for the purpose of effecting a readjustment of its debt. Such petition or petitions shall not be so filed unless the approval of the municipal finance commission, which is hereby constituted a commission for the purposes of this article, be first had and obtained.

Sources. L. 1935, c. 190, §1, p. 464, suppl. to L. 1931, c. 340, p. 830. L. 1935, c. 193, §1, p. 467.

52:27–41. Ordinance or resolution of governing body to authorize filing of petition. The filing of such petition shall be authorized only by ordinance of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, except that in the case of a county or of a school district governed by the provisions of chapter 7 of the title Education (§18:7–1 *et seq.*), such filing shall be authorized by resolution of the governing body adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body. For the purposes of this article the board of education of a school district governed by the provisions of said chapter 7 shall be deemed to be the "governing body" of such school district.

Source. L. 1935, c. 193, §2, p. 469.

52:27-42. Approval by commission of readjustment plan necessary. No plan of readjustment filed with or in the proceedings upon any such petition shall be approved by the court or put into temporary effect or finally confirmed without the approval of the commission.

Source, L. 1935, c. 193, §3, p. 469.

52:27-43. Commission authorized to approve petition and plan; restrictions. The commission may in its discretion give its approval in the manner provided by this article to the filing of any petition for the purpose of effecting readjustment of its debt which any political subdivision proposes to file, and of any plan of readjustment filed with or in the proceedings upon any such petition; but no such plan of readjustment shall provide for the reduction of the principal amount of any outstanding notes or bonds of the political subdivision nor, without the express approval in writing of the commission, for the payment of fees, compensation, reimbursement or other allowances for attorneys, agents, committees, or other representatives of creditors of the political subdivision.

Sources. L. 1935, c. 190, §2, p. 465, suppl. to L. 1931, c. 340, p. 830. L. 1935, c. 193, §4, p. 470, as am. by L. 1935, c. 313, §1, p. 1002.

52:27-44. Powers of political subdivision upon confirmation of readjustment plan; issuance of bonds or notes. Upon the final confirmation of any plan of readjustment approved by the commission, the political subdivision assenting to such plan of readjustment may, by ordinance in the case of a municipality, by resolution in the case of a county, and by resolution of the board of education in the case of a school district governed by the provisions of chapter 7 of the title Education (§18:7-1 *et seq.*), authorize, issue, sell and deliver such bonds, notes or other obligations and enter into such agreements and do such other acts and things as may be required of it pursuant to said plan of readjustment. The full faith and credit of the political subdivision shall be deemed to be pledged for the payment of such notes, bonds or other obligations. Such ordinance or resolution, as the case may be, shall not take effect until

approved by the commission, and shall provide for the issuance of bonds in one or more series, bearing such date or dates, maturing at such time or times, bearing interest at such rate or rates of interest, not exceeding six per cent per annum, payable at such time or times, in such denominations, in such form, either coupon or registered, carrying such registration privileges, payable in such medium of payment at such place or places, subject to such terms of redemption, with or without premium, as the commission may approve.

Source. L. 1935, c. 193, §5, p. 470.

52:27-45. Request for approval of petition, plan, etc.; procedure. The approval of any petition, plan of readjustment or other papers to be filed in any United States court or court in bankruptcy, or of any ordinance or resolution shall be requested by filing in the office of the commission a certified copy of a resolution of the governing body of the political subdivision adopted by the affirmative vote of not less than two-thirds of all the members elected to such governing body, requesting such approval, together with a true and correct transcript duly certified of any proceedings relating to such petition, plan of readjustment, other papers, ordinance or resolution, and the authorization thereof, accompanied by, in the case of documents to be filed in the United States court or court in bankruptcy, the original and one certified copy of such documents, and in the case of an ordinance or resolution, two certified copies of such ordinance or resolution. The approval of the commission under this article of any petition, plan of readjustment or other papers filed or to be filed in a United States court or court in bankruptcy, shall be evidenced only by written indorsement thereof on the petition, plan of readjustment or other papers so filed and the approval of the commission under this article of any ordinance or resolution of the governing body of any political subdivision shall be evidenced only by written indorsement thereof on a certified copy of such ordinance or resolution.

Source. L. 1935, c. 193, §6, p. 471.

Appendix E.

CHAPTER 243

AN ACT to amend sections 52:27–40, 52:27–42 and 52:27–44 of the Revised Statutes in relation to the readjustment of the debts of municipal and other political subdivisions of this State under the Federal bankruptcy act.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 52:27–40 of the Revised Statutes is hereby amended to read as follows:

52:27–40. Any county, municipality, school district or other political subdivision of this State, hereinafter in this article referred to as "political subdivision," shall have power to file a petition or petitions with any United States court or court in bankruptcy under an act of the Congress of the United States entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July first, one thousand eight hundred and ninety-eight, and acts amendatory thereof and supplementary thereto, as the same may be amended from time to time, hereinafter in this article referred to as the "municipal bankruptcy act," for the purpose of effecting a plan of readjustment of its debts or for the composition of its debts, which adjustment and composition are hereinafter interchangeably referred to as readjustment. Such petition or petitions shall not be so filed unless the approval of the municipal finance commission, which is hereby constituted a commission for the purposes of this article, be first had and obtained.

2. Section 52:27–42 of the Revised Statutes is hereby amended to read as follows:

52:27–42. No plan of readjustment filed with or in the proceedings upon any such petition shall be approved by the court or put into temporary effect or finally confirmed

without the approval of the commission. No political subdivision shall so file any such plan which shall not have been approved by the commission nor shall any political subdivision accept any such plan as thereafter changed or modified without express authority from the commission to do so.

3. Section 52:27–44 of the Revised Statutes is hereby amended to read as follows:

52:27–44. Upon the confirmation of any plan of readjustment approved by the commission, the political subdivision assenting to such plan of readjustment may, by ordinance in the case of a municipality, by resolution in the case of a county, and by resolution of the board of education in the case of a school district governed by the provisions of chapter seven of the Title Education (§18:7–1 et seq.), authorize, issue, sell and deliver such bonds, notes or other obligations and enter into such agreements and do such other acts and things as may be required of it pursuant to said plan of readjustment. The full faith and credit of the political subdivision shall be deemed to be pledged for the payment of such notes, bonds or other obligations. Such ordinance or resolution, as the case may be, shall not take effect until approved by the commission, and shall provide for the issuance of bonds in one or more series, bearing such date or dates, maturing at such time or times, bearing interest at such rate or rates of interest, not exceeding six per centum per annum, payable at such time or times, in such denominations, in such form, either coupon or registered, carrying such registration privileges, payable in such medium of payment at such place or places, subject to such terms of redemption, with or without premium, as the commission may approve. The foregoing powers shall be deemed to be in addition to and not in substitution for any powers which such political subdivision would, except for the foregoing grant thereof, have under any other provision of law.

4. This act shall take effect immediately.

Approved May 25, 1938.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

On Appeal from the Court of Errors and Appeals of New Jersey.

BRIEF OF APPELLEE.

WARD KREMER,
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MacCrellish & Quigley Co., Printers, Trenton, New Jersey

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 896.

FAITOUTE IRON & STEEL COMPANY, THE HOWARD SAVINGS INSTITUTION, FLORENCE W. FAITOUTE, *et als.*,

Appellants,

vs.

CITY OF ASBURY PARK, a Municipal Corporation of the State of New Jersey,

Appellee.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF OF APPELLEE.

I.

The Opinions of the Courts Below.

The opinion of the Supreme Court of New Jersey is reported in 19 N. J. Misc. 322, and appears in the Record at page 65.

The opinion of the Court of Errors and Appeals of New Jersey is reported in 127 N. J. L. 239, and appears in the Record at page 70.

II.

The Grounds on Which the Jurisdiction of This Court Is Invoked by the Appellants.

The appellants invoke the jurisdiction of this Court on two grounds:

1. It is contended by the appellants that the provisions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39 are unconstitutional in that they impair the obligation of contracts in violation of Article I, Section 10 of the Constitution of the United States (R., p. 77).

2. It is contended by the appellants that the provisions of Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-34 to 52:27-39, are unconstitutional, in that they deprive appellants of property without due process of law, deny appellants the equal protection of the laws, and abridge the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States (R., p. 78).

III.

Statement of Case.

The New Jersey Court of Errors and Appeals sustained the validity of the New Jersey statute, Article 7 of Chapter 27 of Title 52 of the Revised Statutes, enacted June 27, 1933. This statute is, in reality, a supplement to the Municipal Finance Commission Law enacted in New Jersey April 28, 1931, and constituting Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27-1 to 52:27-39.*

* The applicable sections of Chapter 27 of Title 52 of the Revised Statutes are printed as an Appendix to this Brief.

In 1931 the State of New Jersey, by appropriate legislation, created a Municipal Finance Commission consisting of the Attorney-General, the State Tax Commissioner and the State Auditor (R. S. 52:27–1). The purpose of the legislation was, manifestly, to meet the situation resultant from the economic depression and to set up a state agency which would protect taxpayers, property owners and security holders alike. In fact, the New Jersey Legislature declared its intention in the act itself, which contains the following provision:

> "Remedial law to meet public emergency; liberal construction
>
> "It is declared that this chapter is intended by the legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations and the resulting impairment of public credit, requiring intervention by the state to provide for the payment of existing obligations in such a way as to cause the least embarrassment to property owners as taxpayers, and that this chapter is remedial in nature and the powers hereby granted shall be liberally construed." (R. S. 52:27–65.)

The act provides that, upon the filing of a petition by any bondholder reciting that the municipality had defaulted for over sixty days in the payment of principal or interest of any of its outstanding obligations, the State Supreme Court Justice to whom the petition was presented might make a summary investigation of the matter (R. S. 52:27–2).

This section further provides that if the justice be satisfied that the municipality is in default, he may make an order to that effect, and upon the filing of the same, the Municipal Finance Commission "shall have and exercise

with respect to such municipality the powers and duties prescribed by this chapter."

The jurisdiction of the Court and the commission may also be invoked by the municipality itself, upon its filing with a justice of the Supreme Court a resolution reciting that "due to unusual conditions the municipality is not in a position to meet its obligations when due, in spite of the endeavors of its officers, and petitioning that the commission shall function in the municipality." (R. S. 52:27–3)

Upon the assumption of its duties by the commission, all governmental powers of the elected governing body are henceforth subject to the approval and supervision of the commission. No moneys may be disbursed unless the warrants or checks are countersigned by the auditor appointed by the commission (R. S. 52:27–9).

Upon the failure of the municipal officials to carry out any direction of the commission, the commission may perform directly, or cause to be performed by its agents, in the name of the municipality, any act so directed by the commission, including the power to execute, sell, issue and deliver bonds or notes (R. S. 52:27–13).

The auditor hereinabove referred to, who is, in reality, the representative of the commission in the municipality, is given power "to review all contracts prior to their execution and authorization by the governing body; to recommend the tentative annual budget to the governing body thereof and to the commission; to make recommendations concerning all capital improvements; to investigate the affairs of any department." (R. S. 52:27–13.1.)

The commission is given power to require the appointment of special tax collectors (R. S. 52:27–13.3).

Its powers include the power to provide a budget for the municipality and to direct the Commissioner of Local Government to certify to the said governing body tax levies

for debt service in any certain amounts fixed by the commission. *City of Asbury Park* v. *Darby*, 15 N. J. Misc. 311.

The legislation further empowered the commission to certify to the governing body of the municipality in which it is functioning "resolutions providing for the funding or refunding of notes or bonds or other indebtedness of the municipality, and the interest thereon, which the commission shall have found after public hearing to be outstanding and unpaid and to be due or to become due." (R. S. 52:27–14.)

Resolutions of the commission for the issuance of notes or bonds must "on direction of the commission, be adopted by the proper officials of such municipality in the form certified by the commission." (R. S. 52:27–16.)

Further provisions are made for the publication of the resolutions adopted (R. S. 52:27–18); for the terms and form of the notes or bonds (R. S. 52:27–19); and for the public sale of the securities (R. S. 52:27–20).

It is not necessary for present purposes to recite these provisions in detail. However, it is appropriate to refer specifically to Subdivision b. of Section 52:27–20, which reads as follows:

> "b. With the approval in writing of the commission, any notes or bonds or part thereof may be exchanged for any notes or bonds, including interest thereon, of the municipality issued under this or any other law. The rate of interest borne by any such notes or bonds may be higher or lower than the rate of interest borne by the notes or bonds surrendered."

The legislation was obviously designed for the protection of bondholders and taxpayers alike. The act vested the Municipal Finance Commission with the power, to all intents and purposes, to impound the funds of the munici-

pality. Clothed with the power to provide the municipal budget, the commission could direct the amount of money which must be assessed and levied against property in the community. No moneys could be disbursed except upon the authority of the commission or its accredited representative. An effective brake upon municipal expenditures was thus provided, as a result of which funds became available for the payment of bonds and other outstanding obligations.

The Legislature went on to provide that while the commission was functioning in any municipality, no judgment or execution should be enforced against the municipality for the recovery of the amount due on any municipal bonds unless ordered by a Supreme Court Justice, and that the enforcement of any such judgment should be stayed unless otherwise specially ordered (R. S. 52:27–32.1).

The Legislature, having set up an agency to protect security holders in distressed municipalities and to provide an orderly method for the assembling of the reserves of the municipalities and the payment of the security holders, apparently intended that they should all be treated on a parity, and that while the commission's functions were in progress, no single bondholder should secure an advantage over others in the same class.

The legislation above referred to was entitled "An Act Concerning Municipal Finances" (Laws of New Jersey 1931, Chap. 340), and became Chapter 27 of Title 52 of the Revised Statutes of New Jersey (R. S. 52:27–1 *et seq.*).

On June 27, 1933, the Legislature enacted Chapter 331 of the Laws of 1933 entitled "An Act to Supplement an Act entitled 'An Act Concerning Municipal Finances,' approved April 28, One Thousand Nine Hundred and Thirty-one, constituting Chapter 340 of the Laws of One Thousand Nine Hundred and Thirty-one," and this act is now Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey, comprising Sections 52:27–34 to 52:27–39, inclusive.

It is this supplement which is the subject of appellants' attack, but it will be observed that while it was enacted subsequent to the original legislation, it was enacted as and became an integral part thereof. In construing the enactment of 1933, it must be read in connection with the statute of which it became a part.

The supplement provided that, in a municipality in which the Municipal Finance Commission was functioning, creditors might file a petition with the Supreme Court Justice for the composition of the claims of all creditors—that the justice might take jurisdiction of the subject matter of the petition, and that the commission and all creditors must be given notice thereof (R. S. 52:27–34).

It was required that the petition should allege that the proposed plan or composition "is substantially measured by the capacity of the municipality to pay, *is in the interests of all the creditors affected thereby,* and is not detrimental to other creditors of the municipality." (R. S. 52:27–35.)*

The act then provided that if, after hearing on the plan proposed, it was approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the Court might approve such plan if the justice determined certain facts to exist. These findings are "(1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality." (R. S. 52:27–36.)

* All italics ours unless otherwise noted.

A plan of adjustment so authorized and approved is binding upon *all creditors included in the plan, whether or not they appear in the proceeding.* (R. S. 52:27–37.)

The act further provides that after approval of a plan no creditor whose claim is included in the adjustment shall be authorized to bring any action for the enforcement of his claim, *except with the permission of the Supreme Court,* and then only to recover and enforce the rights given him by the adjustment or composition (R. S. 52:27–38).

The final pertinent provision in the act is that no plan of adjustment may be approved by the commission which provides for the reduction in the principal amount of any outstanding bonds of the municipality. (R. S. 52:27–39.)

Under this legislation, the City of Asbury Park, which had been placed under the control of the Municipal Finance Commission on March 7, 1935, accomplished a refunding of its outstanding bonded indebtedness in the amount of $10,750,000. The facts concerning this refunding are referred to in some detail in the statement of case in appellants' brief, and they are not reiterated here. It is important to state, however, that the bonds of the appellants were included in the city's refunding plan. This appears in the affidavit of Walter Haight, the Auditor and Comptroller of the City (R., p. 61), and it has never been denied by the appellants (Affidavit of Moses W. Faitoute, R., p. 63).

It is equally true that when appellants instituted their suit on their bonds in the New Jersey Supreme Court, they did not secure the permission of the Supreme Court in accordance with R. S. 52:27–38 (Opinion of New Jersey Supreme Court, R., pp. 65, 67). It was on account of the failure of the appellants to secure or to apply for this permission that their action was dismissed in the tribunal in which it was originally instituted.

The affidavit of the City Manager, Milford G. Farley (R., p. 9) sets forth in detail the proceedings undertaken by the city for the refunding of its indebtedness, and recites the transactions which resulted in the consummation of the refunding plan and the placing of the same in operation. It is not contradicted by the appellants and it leaves no doubt that the provisions of the statute were complied with completely.

The New Jersey Supreme Court struck the complaint of the appellants for the reason that they had not applied for nor secured permission of the Court to bring the suit (R., p. 65). The Court of Errors and Appeals of New Jersey affirmed the Supreme Court and held that the legislation herein outlined is constitutional.

IV.

ARGUMENT.

Summary of Argument.

Point I. The Court of Errors and Appeals of New Jersey did not err in affirming the judgment of the Supreme Court of New Jersey dismissing the appellants' complaint, since Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) and Chapter 27 of Title 52 of the Revised Statutes of New Jersey are constitutional enactments and do not impair the obligation of contracts.

Point II. The statute is a lawful exercise of the police power, whether considered as an emergency measure or as permanent legislation.

Point III. Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) and Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) do not deprive appellants of property without due process of law and do not deny to appellants the equal protection of

the laws, nor abridge the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

Point IV. The enactment by Congress of the Federal Municipal Bankruptcy Act August 16, 1937, had no effect whatever upon the validity of the refunding proceeding consummated by the City of Asbury Park pursuant to the New Jersey statute.

POINT I.

The statute, Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) and Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937), is constitutional and does not impair the obligation of contracts.

The Court of Errors and Appeals of New Jersey passed upon the constitutionality of the so-called Municipal Finance Commission Law (Chapter 27 of Title 52 of the Revised Statutes of New Jersey) in the case of *Hourigan* v. *North Bergen Township*, 113 N. J. L. 143 (1934).

In that case the appellants challenged the constitutionality of the statute on the same ground upon which it is challenged here, contending that the legislation was repugnant to Article I, Section 10 of the Federal Constitution. The New Jersey Court took notice of the fact that it was emergency legislation and recited the legislative declaration of the emergency in its opinion. Mr. Justice Heher, speaking for the Court, said:

> "The finding of the legislature that an emergency exists has a factual basis of which we take judicial notice. The legislation is addressed to a legitimate end, and the measures taken are reasonable and appropriate to that end. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398."

Referring to the legislative purpose, Mr. Justice Heher said:

"The act confers upon the finance commission, in respect of the municipality's financial affairs, powers somewhat akin to those exercised by receivers of insolvent corporations. It was designed to give support to the tottering municipalities, and to prevent complete collapse and total paralysis of function. It embodies wise and useful provisions tending to restrain and check the reckless levy of taxes, and to promote economy and the orderly conduct of the municipality's affairs. Its primary purpose is to keep intact the corporate structure, and to continue municipal function until rehabilitation can be affected.

"*This is, of necessity, a proper legislative function, and the rights of creditors, in such a situation, are secondary.* It is a proper exercise of the police power. It is a well established doctrine that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people; and is paramount to any rights under contracts between individuals. While this power is subject to limitations in certain cases, there is wide discretion on the part of the legislature in determining what is and what is not necessary—a discretion which courts ordinarily will not interfere with. *Manigault* v. *Springs*, 199 U. S. 473; 26 Sup. Ct. 127; 50 L. Ed. 274; *Union Dry Goods Co.* v. *Georgia Public Service*

> *Corp.*, 248 U. S. 372. The proper exercise of the police power is the highest duty of government. The state may, in some cases, forego the right of taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty, and consequent power, override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal as well as property rights must be held subject to the police power of the state."

The Court quoted and followed the decision of this Court in *Home Building and Loan Association* v. *Blaisdell, supra*; and discussed the fact that the Municipal Finance Commission legislation fixed no limit to the efficacy of the legislation as distinguished from the statute under scrutiny in the *Blaisdell* case. Mr. Justice Heher proceeded to observe:

> "But it is not requisite that the operation of the law be limited to a definite term. It is the actual existence of the emergency solely, and not the limitation of the law's operation to a prescribed period, that gives validity of this exercise of the reserve element of sovereignty called the police power."

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, attack was made upon the Minnesota statute known as the Minnesota Mortgage Moratorium Law as being repugnant to the contract clause (Art. I, Section 10), and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The act provided that during the emergency which was declared to exist, relief might be had through authorized judicial proceedings with respect to foreclosure of mortgages and execution sales thereunder. The period of re-

demption could be extended by the Court, and the mortgagor was permitted to apply all or a reasonable part of the income from the property toward the payment of taxes, insurance, interest and the mortgage indebtedness. All of these provisions were in contravention of the contractual relations established between mortgagor and mortgagee at the time the legislation was enacted. Mr. Chief Justice Hughes delivered the opinion of this Court, and said:

> "The state court upheld the statute as an emergency measure. Although conceding that the obligations of the mortgage contract were impaired, the court decided that what it thus described as an impairment was, notwithstanding the contract clause of the Federal Constitution, within the police power of the State as that power was called into exercise by the public economic emergency which the legislature had found to exist. * * *
>
> "This Court has said that '*the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.*' This principle embraces alike those which affect its validity, construction, discharge and enforcement. * * *
>
> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford*, 287 U. S. 251, 276, 77 L. ed. 288, 301, 53 S. Ct. 181, 87 A. L. R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read

into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."

The learned Chief Justice discussed the contract clause of the Federal Constitution and its history at some length, and observed:

> "To ascertain the scope of the constitutional prohibition, we examined the course of judicial decisions in its application. These put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula. • • •
>
> "The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

The Chief Justice quoted *Manigault v. Springs*, 199 U. S. 473, in which the principle had been stated as follows:

> "The Court said: 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected.'"

At another point in the opinion, the Chief Justice said:

> "Whatever doubt there may have been that the protective power of the State, its police power, may be exercised—without violating the true intent of the provision of the Federal Constitution—in directly preventing the immediate and literal enforcement of contractual obligations by a temporary and conditional restraint, where vital public interests would otherwise suffer, was removed by our decisions relating to the enforcement of provisions of leases during a period of scarcity of housing. *Block* v. *Hirsh*, 256 U. S. 135, 65 L. ed. 865, 41 S. Ct. 458; 16 A. L. R. 165; *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170, 65 L. ed. 877, 41 S. Ct. 465; *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 66 L. ed. 595, 42 S. Ct. 289."

In *Block* v. *Hirsh*, 256 U. S. 135, emergency legislation growing out of the housing shortage and permitting tenants to hold over after the expiration of the lease, subject to regulation by a commission appointed in the act, was under attack. Mr. Justice Holmes, speaking for the Court, said:

> "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern."

After referring to a line of decisions in support of the principle enunciated, the Justice said:

> "They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair."

The question of the legislative power to enact a law necessary for reasons of economic safety and for the prevention of economic collapse of the State in the face of the provisions of the contract clause of the Federal Constitution, was put at rest in the so-called Gold Clause cases (*Norman* v. *Baltimore & Ohio Railroad Company*, 294 U. S. 240; *Nortz* v. *The United States*, 294 U. S. 317; *Perry* v. *The United States*, 294 U. S. 330).

In *Norman* v. *Baltimore & Ohio Railroad Company*, *supra*, this Court, speaking through Mr. Chief Justice Hughes, passed upon the validity of the joint resolution of Congress of June 5, 1933 with respect to the "Gold Clauses" of private contracts for the payment of money. The resolution relieved the government from the duty to pay in gold dollars of standard weight and fineness of 25 8/10 grains of gold nine-tenths fine, and substituted gold dollars to consist of 15 5/21 grains of gold nine-tenths fine. There can be no question that the value of the thing to be received by the obligee was thus decreased. The Court, speaking through the learned Chief Justice, passed directly upon "the power of Congress to invalidate the provisions of existing contracts which interfere with the exercise of its constitutional authority." The Chief Justice said:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress, *they have a congential infirmity.* Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them. See *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 357, 52 L. ed. 828, 832, 28 S. Ct. 529, 14 Ann. Cas. 560."

Applying the same principle as it was adjudicated upon in the legal tender cases, the Court said:

> "Quoting the statement of the general principle in the legal tender cases, the Court decided that the agreement must necessarily be regarded as having been made subject to the possibility that, at some future time, the Congress 'might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value.' The Court considered it inconceivable that the exercise of such power 'may be hampered or restricted to any extent by contracts previously made between individuals or corporations.' 'The framers of the Constitution never intended any such state of things to exist.' "

The same reasoning was applied at a later point in the opinion, as follows:

> "To subordinate the exercise of the Federal authority to the continuing operation of previous contracts would be to place to this extent the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of the Congress so much of the field as they might choose by 'prophetic discernment' to bring within the range of their agreements. The Constitution recognizes no such limitation."

In *Nortz* v. *The United States, supra,* the plaintiff, the holder of gold certificates, complained that he was required to exchange them for currency not redeemable in gold. Enunciating the same principles applied in *Norman* v. *Baltimore & Ohio Railroad Company, supra,* the Court held that the security holder was not deprived of his property "although at the time of being required to surrender

the certificates the market price of the gold represented by the certificates was in excess of the currency received."

In other words, even the admitted fact that the money received by the security holder was of lesser value than the market price at the time of the gold represented by the security, did not render the transaction nor the legislation authorizing it unconstitutional, in view of the paramount legislative power in the circumstances.

No distinction can be drawn between the monetary loss sustained by the security holders in *Nortz* v. *The United States, supra,* and *Perry* v. *The United States, supra,* in being compelled to accept securities of an alleged lesser value than those they previously held, and the loss claimed to have been sustained by appellants in the instant case, in being compelled to accept a bond bearing a lower rate of interest than the obligation for which it is substituted. Both transactions find their basis in the same legislative power.

In *Norman* v. *Baltimore & Ohio Railroad Company, supra,* the Court referred, with approval, to *Hudson County Water Company* v. *McCarter,* 209 U. S. 349, in which this Court passed upon the question whether legislation enacted in the State of New Jersey under which the diversion of water beyond the State was forbidden, impaired the obligation of a contract to divert the waters of the Passaic River into another State. Discussing the applicability of the contract clause of the Federal Constitution to this situation, Mr. Justice Holmes, speaking for the Court, said:

> "The defense under the Fourteenth Amendment is disposed of by what we have said. That under Article I, Section 10, needs but a few words more. One whose rights, such as they are, are subject to State restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter."

It is well at this point to dispel the impression which appellants have attempted to create in their brief that the decision of the New Jersey Court of Errors and Appeals in the instant case is at variance with its previous adjudications upon this subject. On the contrary, the high Court in New Jersey has repeatedly enunciated the principle that private contracts must yield to the paramount police power of the State when applied to economic conditions. Moreover, it has laid down this principle whether the legislation be of an emergency character or permanent, and its decisions are replete with pronouncements recognizing the force of the maxims hereinabove referred to. One of these decisions, *Veix v. Sixth Ward Building and Loan Association,* 123 N. J. L. 356, was affirmed in this Court in *Veix* v. *Sixth Ward Building and Loan Association,* 310 U. S. 31. Prior to the *Veix* case, however, the New Jersey Court decided *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120.

In that case, action was brought to recover the withdrawal value of ten installment shares of building and loan stock. The plaintiff rested her right of action upon the ground that she was entitled to payment according to the terms and provisions of the statute existing at the time she subscribed for the shares. The previous legislation in existence at the time of the purchase by plaintiff of her shares (and which is recited in detail in the Court's opinion) permitted withdrawals at book value at any time, upon thirty days' notice. By Chapter 102 of the Laws of 1932, the New Jersey Legislature had given matured shares a priority over withdrawing shareholders, and had provided further: "No withdrawal shall be paid if there are not funds sufficient to pay the matured shares on which payment has been requested thirty days after maturity." The Court indicated clearly that a radical change had been

effected in the rights and privileges of withdrawing shareholders. The plaintiff-appellant in the Court of Errors and Appeals of New Jersey did not challenge the prospective effect of the statute, but claimed that if retrospective, it violated her contract rights under Article I, Section 10, of the Federal Constitution. Chancellor Campbell, speaking for the New Jersey Court, said:

> "A legislative declaration of the existence of an emergency is entitled to judicial consideration but the courts must be guided by what is common knowledge. *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398; 54 Sup. Ct. Rep. 231; 78 L. Ed. 413. • • •
>
> "But it is unnecessary to sustain the statute on the temporary ground that it is an emergency statute, because it is sustainable on broad constitutional grounds as a valid exercise of the reserved power of the state. This so-called reserved power is generally referred to as the police power of the state and extends to all great public needs. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110; 55 L. Ed. 112; 31 Sup. Ct. Rep. 486. • • •
>
> "It is well settled, however, that the constitutional interdiction against statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into may thereby be effected. *Home Building and Loan Association* v. *Blaisdell*, *supra* (at p. 437); *Manigault* v. *Springs*, 199 U. S. 473; 50 L. Ed. 274; 26 Sup. Ct. Rep. 127. • • •
>
> "This power is an attribute of sovereignty and all contracts are subject to its future exercise, and not only existing laws but also laws resulting from the exercise of this reserved power are read into

and made a part of all contracts. *Home Building and Loan Association* v. *Blaisdell, supra; Norman* v. *Baltimore and Ohio Railroad Co., et al.*, 294 U. S. 240; 79 L. Ed. 885; 55 Sup. Ct. Rep. 407; *Hourigan* v. *North Bergen, supra; People* v. *Title Mortgage and Guaranty Co., supra.* • • •

"Assuming that the appellant has a vested right of contract, the obligations on contract must yield to a proper exercise of the police power of the state and vested rights cannot inhibit the proper exercise of the power. *Home Building and Loan Association* v. *Blaisdell, supra. In Nebbia* v. *New York, supra* (at p. 523), Mr. Justice Roberts said:

"'Under our form of government the use of property and the making of contracts are normally matters of private concern. The general rule is that both shall be free from governmental interference. But neither property rights or contract rights are absolute; for government cannot exist if the citizen may, at his will, use his property right to the detriment of his fellows or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it.'"

Commenting on the statute, the Court stated flatly:

"The statute denies a withdrawing shareholder a right to sue if the funds are applied as above stated. • • •

"The privilege of suit was granted to withdrawing members by the regulatory statutes of this state and it must be assumed that the legislature intended in granting the privileges of suit to withdrawing members that such a grant would be effective in carrying out the public interest affected upon which the regulation of the building and loan associations was predicated.

> "Experience has demonstrated that adverse economic conditions give the privilege of suit by a withdrawing member a legal force under our insolvency statutes which is absolutely destructive since the unrestricted exercise of the privilege of suit by such members was a motivating and inexorable force that eventually would have forced these associations into insolvency, forced the liquidation of their assets, with the resultant adverse effect upon vital public interests heretofore pointed out."

At another point in the opinion, the learned Chancellor says:

> "The contract was congenitally affected with a public interest and the contract carries with it the infirmity of the subject-matter. Rights which are subject to state restriction cannot be removed from the power of the state by the contract of the parties, nor can one legislature inhibit this power of the state to regulate or abridge the use of such contract rights when such use is destructive of vital public interests."

The Court also referred to and distinguished its decision in *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596, which is relied on by the appellants here. Chancellor Campbell said:

> "Nothing that has been said here should conflict with the holdings in *Vanderbilt* v. *Brunton Piano Co.*, 111 N. J. L. 596, and *Home Building and Loan Association* v. *Blaisdell, supra.* The subject-matter of the contracts in those cases was not per se affected with a public interest. The statutes there in question had effect only upon the interests of the respective contracting parties since the contracts affected thereby were of themselves only capable of a legal

or economic force which was co-terminous with the limits of the contract.

"The contract of the appellant, obviously, is not in the classification."

The same question came before the New Jersey Court of Errors and Appeals in *Veix* v. *Sixth Ward Building and Loan Association*, 123 N. J. L. 356, and the Court, upon the authority of its previous decision in *Bucsi* v. *Longworth Building and Loan Association, supra*, upheld the New Jersey legislation of 1932 (R. S. 17:12–53).* The Court said:

"The plaintiff-appellant says that the 1932 statute is invalid and the burden of the argument is that that statute is unconstitutional because it impairs the obligation of the contract, but we have already held to the contrary in the case of *Bucsi* v. *Langworth Building and Loan Association*, 119 N. J. L. 120, and *Rocker* v. *Cardinal Building and Loan Association*, 119 Id. 134, and this appeal is entirely controlled by our holding in those cases."

Veix v. *Sixth Ward Building and Loan Association, supra*, then reached this Court, 310 U. S. 32, and the constitutionality of the legislation in question was upheld in an opinion delivered by Mr. Justice Reed. Referring to the power of the State to regulate its building and loan associations, Justice Reed said:

"With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares. Unquestionably for the fu-

* The applicable sections of the New Jersey legislation relative to building and loan associations are printed at the end of this Brief in Appendix B.

ture, the provisions of the 1932 Act would be effective. *We think they were equally effective as to shares bought prior to the enactment of the statute,* notwithstanding the provisions of Article I, Section 10 of the Constitution that 'No State shall * * * pass any * * * Law impairing the obligation of contracts * * * ' This is so because the obligation of the Association to respond to the application for withdrawal was subject to the paramount police power. * * *.

"It was while statutory requirements were in effect that petitioner purchased his shares. When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."

Discussing the economic conditions which necessitated legislative action, the Court said:

"An acceleration or a continuance of this tendency to withdraw available funds threatened a quick end to the ability of the institutions to meet even normal demands. Such threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary. * * *.

"The fact that legislation was enacted during an emergency does not mean that it becomes unconstitutional when the emergency ceases where it concerns matter that may properly be the subject of permanent legislation."

Within the past year, these principles have been applied both by this Court and by the New Jersey tribunal. In *Gelfert* v. *National City Bank of New York*, 313 U. S. 221,

a New York statute providing, in substance, that in determining the amount of a deficiency judgment on the foreclosure of a mortgage, the Court should fix the "fair and reasonable market value" of the property and should deduct from the amount of the debt such market value, was held not to violate the contract clause of the Federal Constitution. Mr. Justice Douglas delivered the opinion of this Court and held that the statute was constitutional and was not an impairment of contract obligations in violation of the Federal Constitution, even as applied to a mortgage executed before the enactment of the statute, although, at the time of the execution of the mortgage, the law gave to the mortgagee the right to the full amount of the difference between the debt and the sale price at foreclosure sale. Mr. Justice Douglas said:

> "The formula which a legislature may adopt for determining the amount of a deficiency judgment is not fixed and invariable. That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties that it cannot be constitutionally altered. As this Court said in *Home Bldg. & L. Asso.* v. *Blaisdell*, 290 U. S. 398, 435, 78 L. ed. 413, 427, 54 S. Ct. 231, 88 A. L. R. 1481, 'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.'"

Quoting the opinion of this Court in *Honeyman* v. *Hanan*, 302 U. S. 375, the Court said:

> "As stated by this Court in that case (302 U. S. at p. 378, 82 L. ed. 313, 58 S. Ct. 273), the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard,

> 'by what process legal rights may be asserted or legal obligations' enforced. The principles of those cases are applicable here. The fact than an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman* v. *Jacobs*, 306 U. S. 539, 83 L. ed. 972, 59 S. Ct. 702, *supra*. See *Home Bldg. & L. Asso.* v. *Blaisdell*, 290 U. S. 398, 78 L. ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, *supra*."

And finally, referring to the earlier decisions of the Court on the subject of impairment of contracts, Mr. Justice Douglas said:

> "We cannot permit the broad language which those early decisions employed to force legislatures to be blind to the lessons which another century has taught."

In *Veix* v. *Seneca Building and Loan Association*, 126 N. J. L. 314, decided April 3, 1941, the New Jersey Court of Errors and Appeals again held that a statute designed to meet an economic condition existing in the State was a valid exercise of the police power and did not impair the obligation of contract.

In that case, the Legislature had prescribed, by R. S. 17:12-53, the method and order to be employed by building and loan associations for the payment of maturities and withdrawals, and it had prohibited suit against such associations by any member thereof, to recover the maturity or withdrawal value so long as the funds in the treasury of the association are applied as required by the statute. The Court poses the following question: "Is this statute constitutional as applied to a member who, as plaintiff here, gave notice for the withdrawal value of his prepaid shares prior to its passage?"

The plaintiff's shares had a par value of $200 each and were issued with a provision that they should bear interest at 6 per cent, and that they might be called in and cancelled by the payment of "par value and interest to date of cancellation" to the owner. Plaintiff gave the building and loan association notice of the withdrawal in accordance with the law as it stood prior to the passage of the 1932 statute. The association refused to pay, basing its refusal upon this statute and upon Chapter 48 of the Laws of New Jersey of 1933 (R. S. App. A:7–3 to 7–7).*

The question before the Court was whether the acts of 1932 and 1933, precluding him from maintaining his suit, impaired the obligation of his contract with the association, contrary to the provisions of Article I, Section 10, of the Federal Constitution. It is important also to note that the plaintiff had given his notice of withdrawal three days before the effective date of the statute (Chapter 102, Laws of 1932, R. S. 17:12–53).

Mr. Justice Perskie, speaking for the New Jersey Court, said:

> "We know that we are dealing with 'financial institutions of major importance to the credit system of the state.' We know, without detailing the facts, that building and loan associations, including defendant association, could not by reason of their depreciated assets, owing to the prolonged period of the economic depression and lack of income, meet the heavy withdrawals. We know, as plaintiff was charged with knowing, that 'when he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.' * * *
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> "But in our opinion neither the fact that plaintiff was the owner of prepaid shares, nor the fact that

* See Appendix C.

he gave notice before the passage of chapter 102, L. 1932, nor the combination of both circumstances, is the determinative test as to whether the statute is constitutional or unconstitutional.

"We have already held that the owner of prepaid shares who gave notice of withdrawal after the statutes became effective was not by chapter 102, L. 1932, deprived of any constitutional rights. *Veix* v. *Sixth Ward Building and Loan Association, supra.* We have held likewise when the owner of installment shares gave notice of withdrawal prior to the date when the statute became effective. *Bucsi* v. *Longworth Building and Loan Association,* 119 N. J. L. 120; 194 Atl. Rep. 857. And in the case of *Rocker* v. *Cardinal Building and Loan Association,* 13 N. J. Mis. R. 397; 179 Atl. Rep. 667; affirmed, 119 N. J. L. 134; 194 Atl. Rep. 865, which is strikingly similar to the instant case, there were present both prepaid shares and notice of withdrawal prior to the date when the statute became effective. In that case, too, we held that the statute deprived the holder of no constitutional rights. True, each share of stock in the *Roeker* case recited, on its face, that the 'annual profit of six per cent. per annum is guaranteed on these shares in lieu of all other profits payable semi-annually' and that the shares would be redeemed by the 'payment of maturity value thereof with such guaranteed profits to the date of redemption.' *The use of the words 'profit of six per cent.' and 'maturity value' instead of the words 'interest at six per cent.' and 'par value,' as in the instant case, does not constitute a sufficient basis for distinguishing the two cases, when, as here, the wording of both phrases obviously intended to, and did, in effect, convey the same meaning.*"

This language leaves no doubt whatever that the Court was passing upon legislation which required the holder of building and loan shares to accept security of a lesser value than that he had owned and paid for. He was required to withdraw his shares at "maturity value" instead of at "par value."

Mr. Justice Perskie finally grounded the decision of the Court upon the following proposition:

> "From all that has been written, it becomes increasingly clear that we have steadfastly adhered to the well recognized rule of law determinative of the constitutional exercise of the reserved police power of the state over property and contract rights. That rule of law is that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power. But such a result can only be effected if the exercise of the power is for an end which is in fact public and the means adopted is reasonably adapted to that end. Cf. Indiana, *ex rel. Anderson* v. *Brand*, 303 U. S. 95, *108-*109; 82 L. Ed. 685, 695, and cases cited in footnote No. 17; *Nebbia* v. *New York*, 291 U. S. 502; 78 L. Ed. 940; *Veix* v. *Sixth Ward Building and Loan Association* (U. S.), *supra*, (at p. *44); 84 L. Ed. 1067. Contracts which relate, as here, to a subject-matter which lies within the control of the legislature, have a 'congenital infirmity' of being subject to the proper exercise of the police power. Cf. Gold Clause cases—*Norman* v. *Baltimore and Ohio Railroad Co.*, 294 U. S. 240; 79 L. Ed. 885; *Nortz* v. *United States*, 294 U. S. 317; 79 L. Ed. 907; *Perry* v. *United States*, 294 U. S. 330; 79 L. Ed. 912."

The considerations which motivated the Court in *Veix* v. *Seneca Building and Loan Association, supra*, as well

as in the other cases cited, are equally applicable to the instant case. In the *Veix* case, the Court was dealing with building and loan associations, designated by the Court as "financial institutions of major importance to the credit system of the State." Municipal corporations are of equal or greater importance as units in the government of the State, and their preservation and financial stability are vitally important to the welfare of their inhabitants and taxpayers and to their creditors. In the *Veix* case, the Court observed that owing to the prolonged period of economic depression, the associations could not meet heavy withdrawals, therefore, legislation was enacted to save the situation. The identical considerations applied in the case of the Municipal Finance Commission legislation. Over twenty-one hundred municipalities in the United States were in default on their bonds in 1932. This condition was widespread and the New Jersey Legislature was quick to recognize the fact. Widespread municipal default on bonded indebtedness, with indiscriminate suits and judgments, writs of mandamus requiring the raising of such judgments in municipal budgets, and the unchecked onset of creditors, might soon have wrecked the credit of all these municipalities. Abnormally high tax rates to pay such claims would simply have frustrated their own end, namely, the collection of taxes, because it is a well recognized principle in taxation that if the rate of taxation rises to a prohibitive point, property owners simply do not pay, properties are lost, and the aims of creditors seeking to collect on their claims are defeated. To prevent this complete economic collapse, the State of New Jersey enacted the legislation now the subject of review.

The cases above cited furnish abundant authority for the following propositions:

(a) The passage of the act was within the police power of the State;

(b) The rights of the holders of contracts, whether entered into before or after the passage of legislation, were subject to the exercise of this police power;

(c) The statute did not impair the obligation of contracts under Article I, Section 10, of the Federal Constitution.

POINT II.

Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) is a lawful exercise of the police power, whether considered as an emergency measure or as permanent legislation.

While the legislation under discussion contained a provision declaring that it was designed to meet an emergency (R. S. 52:27–65), this is not a necessary element to render the legislation constitutional.

In view of the decisions cited in Point I of this brief, it is respectfully suggested that it is not necessary to reiterate them at length here. In *Gelfert* v. *National City Bank of New York*, 331 U. S. 221, 235, Mr. Justice Douglas said:

> "The fact that an emergency was not declared to exist when this statute was passed, does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman* v. *Jacobs*, 306 U. S. 539."

In fact, the constitutionality of the legislation is grounded, not upon its emergency nature, but upon the reserve police power of the State. *Veix* v. *Seneca Building and Loan Association, supra; Veix* v. *Sixth Ward Building and Loan Association, supra.*

The declaration of an emergency strengthens the law and furnishes an additional reason for its validity. Viewed in either aspect, however, whether as an exercise of police power alone or as an exercise of police power designed to meet an emergency, the legislation is equally valid.

POINT III.

Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) and Article 7 of Chapter 27 of Title 52 of the Revised Statutes of New Jersey (1937) do not deprive appellants of property without due process of law and do not deny to appellants the equal protection of the laws, nor abridge the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States.

The contention of appellants that the legislation under attack deprives appellants of property without due process of law and denies appellants the equal protection of the laws and abridges the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States is disposed of by the same decisions cited to dispose of the objection of appellants that the legislation impairs the obligation of contracts. The same principles of law and the same rationale are appropriate to meet both objections in the instant case. *Hudson County Water Company* v. *McCarter*, 209 U. S. 349.

The legislation enacted in New Jersey to regulate building and loan associations contains the same provisions changing the methods of enforcement of the obligation and restricting the right to institute suit as are embodied in the

legislation here under attack. And in the cases cited in Point I, that legislation has been upheld.

For these reasons, the cases there cited are not referred to again here, but are cited in answer to Point II of appellants' brief.

POINT IV.

The enactment by Congress of the Federal Municipal Bankruptcy Act of August 16, 1937, has no effect whatever upon the validity of the refunding proceeding consummated in Asbury Park pursuant to the State Statute.

The appellants argued in the State Court that when Congress adopted the Federal Municipal Bankruptcy Act in 1937, the New Jersey statute became inoperative and that the order of the Supreme Court of New Jersey authorizing the refunding plan of the City of Asbury Park to go into effect was therefore a nullity. They argue here that the Federal statute constitutes a bar to the enactment by the State of New Jersey of the legislation here under discussion and precludes any proceeding under it. They cite *United States* v. *Bekins*, 304 U. S. 27 (82 L. Ed. 1137), as authority for this contention. However, it requires only a careful reading of the *Bekins* case to demonstrate that there is no force whatever in this contention.

In 1934, Congress passed the first Municipal Bankruptcy Act. The United States Supreme Court in *Ashton* v. *Cameron County Water Improvement Company*, 298 U. S. 513, declared the act unconstitutional on the specific ground that it was an interference with State sovereignty. On August 16, 1937, the New Federal Municipal Bankruptcy Act was passed, and in *United States* v. *Bekins, supra*, this legislation was declared constitutional. The opinion of the Supreme Court by Chief Justice Hughes furnishes the answer

to the appellants' contention. The distinction between the two pieces of legislation was, in short, that the second act, unlike the first, is conditioned upon consent by the State. Mr. Justice Hughes quoted the report of the Committee on the Judiciary of the House of Representatives on the bill as follows:

> "The bill here recommended for passage expressly avoids any restriction on the powers of the states or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental purposes of a political subdivision is permitted. *The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation.* No involuntary proceedings are allowable and no control or jurisdiction over that property and those revenues of the petitioning agency necessary for essential governmental purposes is conferred by the bill."

The Chief Justice proceeds to analyze the statute as follows:

> "The statute is carefully drawn so as not to impinge upon the sovereignty of the state. The state retains control of its fiscal affairs. The bankruptcy power is exercised in relation to a matter normally within its province, *and only in a case where the action of the taxing agency, in carrying out a plan of composition approved by the bankruptcy court, is authorized by state law.*"

Discussing economic conditions from which had arisen the necessity for the legislation, the Chief Justice proceeds to observe:

> "The bankruptcy power is competent to give relief to debtors in such a plight, and, if there is

> no obstacle to its exercise in the case of the districts organized under state law, *it lies in the right of the state to oppose federal interference.* The state steps in to remove that obstacle. The state acts in aid and not in derogation of its sovereign powers. *It invites the intervention of the bankruptcy power to save its agency which the state itself is powerless to rescue.*"

These observations and this opinion by our highest Court make it clear that a Federal municipal bankruptcy statute which it is sought to invoke without the consent of the State is an infringement of State sovereignty. Such a statute, conditioned upon consent by the State, does not so infringe. On this ground, the second Federal Municipal Bankruptcy Act has been held constitutional, but nothing could be further from the fact than to allege that it supersedes the State legislation, or deprives the State of any inherent power it already possessed. In fact, a proceeding under the Federal act can only be set in motion with the consent of the State. *New Jersey has given that consent only where the Municipal Finance Commission authorizes application to the Federal Court in bankruptcy by the municipality concerned.* Section 83 (e) of the new bankruptcy act provides as a condition of confirmation of a plan of composition that it must appear that the petitioner was "authorized by law to take all action necessary to be taken by it to carry out the plan." In his opinion in the *Bekins* case, Chief Justice Hughes held that this required the consent of the State, and that it is "of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of the governmental power." *United States* v. *Bekins*, 304 U. S. 27, 51.

New Jersey has guarded this right zealously, and in the Fort Lee refunding, while the litigation was pending

(*Borough of Fort Lee* v. *U. S., Ex Rel, Barker,* 104 F. (2d) 275), a proceeding for the refunding of the municipal debt was instituted under the new Federal Act, *upon the consent of the New Jersey Municipal Finance Commission.* In other words, the Borough of Fort Lee itself initiated the proceeding. No one could have forced it to avail itself of the benefit of the provisions of the legislation. Coupled with its application, it had, and of necessity, required the consent of the State agency, namely, the Municipal Finance Commission. Thus, it can readily be seen that it does not supersede the State legislation in which a creditor may make the application, nor was it ever intended so to do.

The matter of jurisdiction of the State and Federal Courts in the matter is analogous to that in the ordinary receivership and bankruptcy cases: A proceeding in receivership may be instituted in the State Court of Chancery despite the existence of the Federal bankruptcy law. If, during the pendency of that proceeding, bankruptcy ensues, the proceeding in the State tribunal is superseded, but this is not to say that the proceedings in the Chancery Court are inoperative merely because of the existence of another remedy—namely, a bankruptcy proceeding under the Federal statute. The same reasoning should be applied to the proceeding for the refunding of a municipal debt under the State law. Until a proceeding is instituted under the Federal act and with the necessary consent by the State, which must accompany such a proceeding, the Federal legislation is in no sense applicable nor operative.

Appellants take the position that the order of the New Jersey Supreme Court in the Asbury Park proceeding entered April 29, 1938, was a nullity, because the Federal legislation had been enacted August 16, 1937. However, the New Jersey Supreme Court had taken jurisdiction of the matter February 1, 1936, when the petition for ap-

proval of a plan of composition was filed, as shown by the affidavits on file in the motion to strike. It is as of that date that the statutory law, both State and Federal should be considered, and there was then no valid Federal municipal bankruptcy act in existence.

In conclusion on this point, it should be observed that if the position of the appellants were correct, then the existing outstanding new bonds to the extent of over $10,000,000.00, issued by the City of Asbury Park, would not be valid subsisting obligations of the city. It is not enough for the appellants to attempt to concede that the acceptance of these obligations by bondholders who exchanged their old bonds for new bonds renders them legal obligations. Obligations are legal only if legally issued. The Municipal Finance Commission of the State of New Jersey approved the proceeding for the issue of these new bonds and approved their issuance. Obviously, the Commission placed the same construction upon the applicability of the Federal legislation as is now placed upon it, and interpreted *United States* v. *Bekins, supra,* the way it is interpreted here.

Conclusion.

It remains to consider two cases cited by the appellants and the effect of an adverse decision upon the Asbury Park refunding operation and the bonds held by other bondholders.

Appellants cite *Sovereign Camp W. O. W.* v. *Wilentz,* 23 Fed. Supp. 23, as authority for the proposition that the legislation under discussion is unconstitutional. In that case, however, the Court, speaking through Judge Avis, specifically indicated that it was not passing upon the constitutionality of the legislation. The Court said:

> "We are not construing the Municipal Finance Commission Act of the State of New Jersey, its constitutionality, or its effect, except as the stays therein contained affect the right of the complainant to *enforce* its judgment."

The other case on this point cited by appellants (*State, ex rel. Phelps* v. *Fort Lee*, 14 N. J. Misc. 895) was to the same effect. In both cases, judgments had been secured before the municipalities were placed under the control of the Municipal Finance Commission, and the Courts, in the exercise of their discretion, awarded writs of mandamus to enforce the judgments obtained. Since that time, the New Jersey Court of Errors and Appeals (*Hourigan* v. *North Bergen Township, supra*) has held the stay provision constitutional. In the building and loan cases cited (*Veix* v. *Sixth Ward Building and Loan Association, supra*) this Court has held similar stay provisions constitutional. These decisions alone furnish a complete answer to appellants' contention.

Beyond this, however, in the instant case, no judgment has been secured and the question of the exercise of judicial discretion in the award of a writ of mandamus to enforce the judgment, is consequently not before the Court. For these reasons it will readily be seen that *Sovereign Camp W. O. W.* v. *Wilentz, supra*, and *State, ex rel. Phelps* v. *Fort Lee, supra*, are not in point.

It is difficult to follow the reasoning of the appellants to the effect that if the New Jersey legislation fails, the bonds issued pursuant to it, will not be invalid. Asbury Park issued bonds in the amount of $10,750,000.00 under its refunding plan and pursuant to the statute here under attack. The validity of those bonds undoubtedly depends on the validity of the legislation pursuant to which they were issued. Moreover, it will be readily observed from an

inspection of the city's refunding plan (R. 17), that a limitation is placed upon the amount to be raised for debt service each year. Obviously the tax rate of the city depends upon the debt service appropriation. If appellants were now to obtain judgment and were to enforce the judgment by a mandamus, the result would have to be the inclusion of the judgment of approximately $105,000.00 in the city's budget. This would sharply increase the tax rate and would disrupt the entire refunding plan to the great injury of the remaining bondholders. As a result of the application of the statute to the affairs of the city, order has been restored where there was chaos before. It is unquestionable that injury to the taxpayers, impairment of the value of property, and impairment of the market value of the securities held by the vast majority of the bondholders who accepted the plan, would result from the entry of a judgment which would enable appellants to collect in full. Moreover, the validity of the entire outstanding bond issues would be called in question with a consequent reduction in the value of those securities. It was to avoid all these conditions that the Legislature adopted the refunding law in New Jersey.

For the reasons herein urged, it is respectfully submitted that the judgment of the Court of Errors and Appeals of New Jersey, affirming the judgment of the Supreme Court of New Jersey, dismissing the appellants' complaint, should be affirmed.

Respectfully submitted,

WARD KREMER,
Attorney of Appellee.

APPENDIX A.

Pertinent Sections of Chapter 27 of Title 52 of the Revised Statutes of New Jersey.

52:27–2. **Petition to Supreme Court Justice alleging municipal default; procedure; commission to function.**

Whenever it shall be made to appear to a justice of the Supreme Court by any petition filed with him by or on behalf of the holder of any notes or bonds of any municipality of this State, verified by the petitioner, or his or its duly authorized agent, that such municipality has defaulted for over sixty days in the payment of the principal or interest of any of its outstanding notes or bonds held by the petitioner, the justice may make a summary investigation into the facts disclosed in the petition. For that purpose he may subpœna witnesses and call before him any officers of the municipality.

If it shall be established to the satisfaction of the justice that the municipality is so in default, he may make an order to that effect and file the same, together with the petition, in the office of the clerk of the Supreme Court.

Upon the filing of such order, together with the petition, the commission shall have and exercise with respect to such municipality the powers and duties prescribed by this chapter.

Sources. L. 1931, c. 340, § 101, p. 830, as am. by L. 1933, c. 9, § 1, p. 21. L. 1931, c. 340, § 102, p. 831, as am. by L. 1932, c. 236, § 1, p. 519, L. 1933, c. 330, § 1, p. 859.

52:27–3. **Resolution by municipality declaring inability to meet obligations; procedure before Supreme Court; commission to function.**

Any municipality may file with a justice of the Supreme Court a certified copy of a resolution adopted by the gov-

erning body of the municipality, reciting in general terms that due to unusual conditions the municipality is not in a position to meet its obligations when due, in spite of the endeavors of its officers, and petitioning that the commission shall function in the municipality.

Upon the filing of such petition and upon such notice to the commission as the justice may direct, the justice may make a summary investigation into the facts. For that purpose he may subpœna witnesses and call before him any officers of the municipality.

If it shall be established to the satisfaction of the justice that the municipality is so unable to meet its obligations, he may make an order to that effect and file the same, together with the petition, in the office of the clerk of the Supreme Court.

Upon the filing of such order, the commission shall function in such municipality with all the powers and duties conferred by this chapter.

Sources. L. 1931, c. 340, § 103, p. 831, as am. by L. 1933, c. 330, § 2, p. 860.

52:27-4. **Duration of commission in municipality; subsequent powers of State Auditor.**

The commission shall continue in force in such municipality, and shall exercise the powers and perform the duties conferred by this chapter until all bonds or notes or other indebtedness of the municipality which has fallen due, and all bonds or notes which will fall due within one year, and the interest thereon, have been paid or funded or refunded, or the payment thereof in cash adequately provided for by a cash reserve, excepting tax anticipation or tax revenue notes or bonds of the current year, at which time its authority under this chapter shall cease.

Thereafter the State Auditor shall have the power to continue the employment of the auditor as provided for in Section 52:27-6 of this Title and to exercise the powers of

the commission under Section 52:27–22 of this Title, until the gross and net debt of such municipality, including notes or bonds issued under this chapter, is within all statutory limits, at which time his authority under this chapter shall cease.

Source. L. 1931, c. 340, § 403, p. 835, as am. by L. 1933, c. 330, § 10, p. 865.

52:27–8. **Office for auditor; access to books and records.**

The auditor employed by the commission shall have an adequate office in the municipal building, if any, and shall have access to all books of account, records, papers and memoranda of such municipality.

Source. L. 1931, c. 340, § 302, p. 834.

52:27–9. **Warrants and checks to be countersigned by auditor.**

All warrants, checks or other instruments for the withdrawal or transfer of funds of the municipality shall be submitted to such auditor for his countersignature, and no banking institution in which funds of the municipality have heretofore been or shall hereafter be deposited shall honor warrants or checks drawn thereon unless the countersignature of such auditor shall appear on the face of such instruments.

Source. L. 1933, c. 330, § 7(302a), p. 863 (amendment), suppl. to L. 1931, c. 340, p. 830.

52:27–13. **Commission may carry out directions not complied with by municipality.**

Whenever any direction of the commission authorized under this chapter has not been fully performed or carried out by the officials of the municipality affected, the commission may perform directly, or cause to be performed by its agents, in the name of the municipality, any act so directed by the commission, including the power to execute, sell, issue and deliver any bonds or notes directed

to be issued under a resolution certified in accordance with Section 52:27–14 of this Title.

Source. L. 1931, c. 340, § 402, p. 834.

52:27–13.3. **Special collectors; appointment.**

Whenever, pursuant to this chapter, the commission shall function in a municipality, it shall have, in addition to the powers granted in Sections 52:27–13.1 and 52:27–13.2 of this Title, the power by resolution to recommend to the governing body of such municipality the appointment of one or more persons to act as special collectors of delinquent taxes or any other revenues in such municipality. Thereupon it shall be the duty of the governing body, with the concurrence and approval of the commission, to appoint a person or persons satisfactory to the governing body and to the commission to act as such special collector or collectors and to fix his or their compensation, and it shall be lawful so to appoint a person or persons residing outside of the municipality.

Source. L. 1935, c. 292, § 4, p. 928, suppl. to L. 1931, c. 340, p. 830.

52:27–14. **Funding or refunding indebtedness; resolution by commission.**

The commission may from time to time prepare and certify to the governing body of any municipality in which the commission is functioning, resolutions providing for the funding or refunding of notes or bonds, or other indebtedness of the municipality, and the interest thereon, which the commission shall have found after public hearing to be outstanding and unpaid and to be due or to become due.

Source. L. 1931, c. 340, § 201, p. 831, as am. by L. 1932, c. 236, § 3, p. 519, L. 1935, c. 192, § 1, p. 467.

52:27-20. **Public sale of notes or bonds; exceptions.**

All such notes or bonds shall be sold at not less than par at public sale after notice setting forth the terms and conditions of sale, published in such newspaper circulating in the municipality, and in such financial newspaper, as shall be designated by resolution, except in the following cases:

a. If no bids are received at such public sale, or if all bids are rejected, any notes or bonds or part thereof may with the written assent of the commission be sold without further notice at private sale at any time within six months.

b. With the approval in writing of the commission, any notes or bonds or part thereof may be exchanged for any notes or bonds, including interest thereon, of the municipality issued under this or any other law. The rate of interest borne by any such notes or bonds may be higher or lower than the rate of interest borne by the notes or bonds surrendered.

Source. L. 1931, c. 340, § 207, p. 832, as am. by L. 1932, c. 236, § 6, p. 520.

52:27-32.1. **Enforcement of judgments, etc., against municipality stayed; necessity of court order.**

Whenever the commission shall function in any municipality and so long as it shall continue so to do, no judgment, decree, levy or execution against the municipality or the property thereof for the recovery of the amount due on any bonds, notes or other obligations of the municipality, in the payment of which the municipality has defaulted, shall be enforced until otherwise specially ordered by the Supreme Court or a justice thereof in an appropriate proceeding for such purpose, after notice to the commission, and the enforcement of any such judgment, decree, levy or execution shall be stayed until otherwise specially ordered as aforesaid.

Source. L. 1932, c. 236, § 16(351), p. 526 (amendment) as am. by L. 1933, c. 330, § 8, p. 863, suppl. to L. 1931, c. 340, p. 830.

52:27-34. **Petition by creditors; plan of adjustment or composition; parties; notice.**

Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the Supreme Court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the Supreme Court.

The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the Supreme Court by its justice may direct. Any creditor of the municipality may appear and assert his rights.

Source. L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-35. **Allegations in petition.**

In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 1, p. 866, suppl. to L. 1931, c. 340, p. 830.

52:27-36. **Approval by Supreme Court Justice of plan of adjustment or composition; findings.**

In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the Supreme Court by a justice thereof may by order authorize and approve such adjustment or composition if the Court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions, and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

Source. L. 1933, c. 331, § 2, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-37. **Approved plan binding on all creditors; substituted obligations.**

The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

Source. L. 1933, c. 331, § 3, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-38. **Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted.**

After the institution of any proceeding provided for by this article and pending the determination thereof, the Supreme Court by a justice thereof may by order continue the stay provided by Sections 52:27-32.1 and 52:27-33 of this Title.

In the event that a plan shall be authorized and approved pursuant to this article the Court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the Supreme Court and then only to recover and enforce the rights given him by the adjustment or composition.

Source. L. 1933, c. 331, § 4, p. 867, suppl. to L. 1931, c. 340, p. 830.

52:27-39. **Reduction in principal of outstanding notes or bonds prohibited.**

Notwithstanding any provisions of this article, the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality.

Source. L. 1933, c. 331, § 5, p. 868, suppl. to L. 1931, c. 340, p. 830.

52:27-65. **Remedial law to meet public emergency; liberal construction.**

It is declared that this chapter is intended by the Legislature to meet the public emergency arising from a default in the payment of municipal and school district obligations and the resulting impairment of public credit, requiring intervention by the State to provide for the payment of existing obligations in such a way as to cause the least

embarrassment to property owners as taxpayers, and that this chapter is remedial in nature and the powers hereby granted shall be liberally construed.

Sources. L. 1931, c. 340, § 405, p. 835. L. 1935, c. 258, § 20, p. 838, suppl. to L. 1903 (2d Sp. Sess.) c. 1, p. 5.

APPENDIX B.

Pertinent Sections of New Jersey Legislation Regulating Building and Loan Associations Laws of 1925, Chapter 65.

Article III, Sec. 49 (P. L. 1925, p. 211).

1. Withdrawal of Shares.

49. **How withdrawn.**

The shares of every such association of this State, or doing business therein, may be withdrawn by the holder at any time, by giving such written notice as may be provided for in the constitution or by-laws, not to exceed thirty days; if the withdrawal be made within the first year, the withdrawal value of the shares withdrawn shall be not less than the sum of the subscription or dues paid on such shares, less a proportionate share of any loss sustained by such association; after the first year a reasonable share of the profits less unpaid fines shall be included in the withdrawal value; in case such shares are pledged as collateral security for the repayment of a loan made thereon by such association, the amount of such loan shall be deducted from such withdrawal value and the difference only paid to such member; amounts paid for salaries, commissions and other current expenses shall not be considered losses within the meaning of this section.

Article III, Sec. 52 (P. L. 1925, p. 212).

52. **Payment of withdrawals.**

Withdrawals from any such association shall be paid in the order in which the notices thereof shall have been received, but not more than one-half of the receipts of any one month shall be required to be used for the payment of withdrawal claims, without the consent of the board of directors, until the oldest of such claims then unpaid shall have been on file for a period of six months; but in no case shall payment be postponed for a period longer than six months from the date of such notice, and any member who has given the said notice may sue for and recover the withdrawal value of his shares in any such association in any court of competent jurisdiction, if the same is not paid in six months from the date of the giving of said notice of withdrawal.

Article 7 of Chapter 12 of Title 17 of the Revised Statutes of New Jersey.

17:12-49. **Withdrawal of shares.**

The shares of every building and loan association of this State, or doing business herein, may be withdrawn by the holder upon giving such written notice, not exceeding thirty days, as its constitution provides. Upon withdrawal of such shares a reasonable portion of the dividends or profits, if any, credited to such shares may be retained by such association and the remainder of the amounts credited on such shares, less fines and other obligations thereon, paid to the withdrawing member in the manner otherwise provided in this chapter, but no fines shall be deducted from the dues credited on shares which shall be withdrawn within one year after such shares shall have been subscribed. This section shall not be construed to prevent a reduction of the share liability of any such association to its members for the purpose of providing for losses or anticipated losses

or of reserving against them as otherwise provided in this chapter. The commissioner, if it appears to him that the association is in an unliquid condition, may authorize the making of a written agreement, which shall be binding on assenting members of the association, whereby the assenting members shall agree not to file a notice of withdrawal before a date specified in the agreement. Notice of the agreement shall be printed or stamped upon the face of the certificate or pass book, or both, of each assenting member when the certificate or pass book comes into the possession of the association.

Source. L. 1925, c. 65, § 49, p. 211, as am. by L. 1932, c. 92, § 1, p. 161; L. 1935, c. 59, § 10, p. 152.

17:12-53. **Payment of maturities and withdrawals.**

Maturities and withdrawals shall be paid in the manner and subject to the limitations provided herein.

a. Maturities shall be paid in the order in which they become due except as provided herein and withdrawals shall be paid in the order in which notices of withdrawal shall have been filed except as provided herein; and

b. The maturities of any one month shall be paid before the maturities of subsequent months; and

c. One-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of maturities or for the establishing of maturity reserves and another one-third of the net receipts of any such association in each fiscal month shall be made available so far as necessary for the payment of withdrawals; and the words "net receipts," as used in this section, shall be construed to mean the moneys, other than borrowed moneys, received by any such association less moneys used for operating expenses, moneys used to pay creditor obligations, moneys used for the conservation, preservation or protection of the property and assets of such association, and moneys reserved for any of such purposes; and

d. If at the end of any fiscal month the funds of any such association required to be made available for the payment of withdrawals, together with such other funds, if any, made available for such purpose by the board of directors, shall be insufficient for the payment of all withdrawals then due and payable, the board of directors of such association shall, so far as possible, pay out of such funds, on account of the sum due to each member who has filed notice or notices of withdrawal, without regard to the fact that such notice or notices shall have been filed by such member on more than one share account, in the order in which such notices shall have been filed, the sum of fifty dollars or the balance due to such member, whichever is less and, if the available funds shall not thereby be exhausted or become inadequate, shall, so far as possible, again pay on account of the sum due to each such withdrawing member, in said order, the sum of fifty dollars or the balance due to such member, whichever is less, and shall repeat the process until the available funds shall become inadequate or exhausted; and subsequent available funds, when available, shall be applied to the payment of then existing withdrawal obligations in the same manner beginning with the withdrawal of the member next following the one on whose account the last such payment was made; and, in the event, that such member shall have filed more than one notice of withdrawal, his place in the order of payment shall be as of the date and time of the first notice filed by him; and

e. No member to whom any such association shall be obligated for the payment of any maturity or withdrawal shall have the right to bring suit against such association to recover the maturity or withdrawal value of his shares or any part thereof so long as the funds of such association shall be applied as required by this section; and

f. The board of directors of any such association shall have the right, in its discretion, to make available additional funds other than those required in paragraph "e" of this section for the payment of maturities and with-

drawals; but no more than one-third of the net receipts as defined in said paragraph "c" shall be used for the payment of withdrawals while maturities remain unpaid. Borrowed moneys shall not be used for the payment of withdrawals while maturities remain unpaid.

Source. L. 1925, c. 65, § 52, p. 212, as am. by L. 1932, c. 102, § 1, p. 175; L. 1935, c. 59, § 11, p. 153, L. 1936, c. 118, § 4, p. 295.

APPENDIX C.

Revised Statutes of New Jersey,

Chapter 7.

App. A:7–3. **Additional powers enumerated.**

1. The Commissioner of Banking and Insurance shall have power, in addition to such other powers as he may have, notwithstanding the provisions of the act to which this act is a supplement and the amendments and supplements thereof, from time to time, to make orders for the purpose of conserving the assets of the building and loan associations of this State, which orders shall have the same force and effect as law and be binding on any and/or all building and loan associations of this State, whereby:

(a) to regulate the method of paying the withdrawal value and/or maturity value of shares of any and/or all of such associations;

(b) to regulate and/or postpone the filing of applications for withdrawal of shares and of requests for payment of maturity value of shares of any and/or all such associations;

(c) to regulate or postpone the payment of all or any part of the maturity value or of the withdrawal value of shares of any and/or all such associations;

(d) to require any and/or all such associations to establish additional reserves or increase present reserves and to regulate any reserves of any and/or all such associations

and to prescribe the manner in which such reserves shall be established;

(e) to regulate, allocate, prohibit or postpone the receipt and/or disbursement of funds by any such associations;

(f) to effect such changes and/or reorganization in the business and/or affairs of any and/or all such associations as he shall deem necessary or proper;

(g) Whenever it is essential, in the public interest, to appoint under his hand and official seal one or more conservators to assist him in the operation of the business of any building and loan association in this State and such conservator shall execute such changes and/or reorganization in the business and/or affairs of any such association as may be directed by the commissioner; and shall be subject to such orders or regulations as issued or may hereafter be issued by the commissioner pursuant to the provisions of this act. The commissioner may require of such conservator such bond and security as he deems proper. The conservator, under the direction of the commissioner, shall take possession of the books, records and assets of every description of such association, and take such action as may be necessary to conserve the assets of such association pending further disposition of its business as provided by law. Such conservators shall have all the rights, powers and privileges now possessed by or hereafter given receivers of corporations organized and existing under the laws of this State, and in addition thereto, the right to renew and/or pay on account of maturing creditor obligations, and to secure the same if necessary, and the further right and power to incur new obligations, if in the interest of said association, and shall be subject to the obligations and penalties not inconsistent with the provisions of this act to which said conservators are now or may hereafter become subject; provided, however, that said conservators shall not have the power to liquidate any such association. During the time that such conservator remains in posses-

sion of such association, the rights of all parties with respect thereto shall, subject to the provisions of this subchapter, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such association and shall be a lien thereon, which shall be prior to any other lien. The commissioner shall fix the compensation of such conservator and of such persons employed by him in the performance of his duties, which compensation shall be disbursed from the funds of such association. If the commissioner becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion terminate the conservatorship and permit such association to resume the transaction of its business, subject to such terms, conditions, restrictions and limitations as he may prescribe, in which event said association shall become revested with title to all the real and personal property wherever situated. (L. 1933, c. 48, § 1, p. 94, as am. by L. 1933, c. 166, § 1, p. 346, L. 1933, c. 258, § 1, p. 694, L. 1933, c. 381, § 1, p. 1068, suppl. to L. 1925, c. 65, p. 189.)

App. A 7-4. **Commissioner not liable in damages.**

2. The commissioner shall not be liable in damages to any person by reason of errors of judgment in carrying out the powers herein conferred on him nor shall he be liable in damages for failure to act under said powers. (L. 1933, c. 48, § 2, p. 95, as am. by L. 1933, c. 166, § 2, p. 348, L. 1933, c. 258, § 2, p. 696, L. 1933, c. 381, § 2, p. 1070, suppl. to L. 1925, c. 65, p. 189.)

App. A 7-5. **Commissioner may modify, suspend or revoke orders.**

3. The commissioner shall have authority to repeal, suspend or modify any order made by him pursuant to the provisions of this law. (L. 1933, c. 48, § 3, p. 95, as am. by L. 1933, c. 166, § 3, p. 348, L. 1933, c. 258, § 3, p. 696. L. 1933, c. 381, § 3, p. 1070, suppl. to L. 1925, c. 65, p. 189.)

App. A:7-6. **Orders effective, when.**

4. No order made hereunto nor any suspension, modification or repealer thereof shall be effective until a copy thereof shall be filed in the Department of Banking and Insurance and a copy thereof delivered or mailed to the association or associations affected. (L. 1933, c. 48, § 4, p. 95, as am. by L. 1933, c. 166, § 4, p. 348, L. 1933, c. 258, § 4, p. 696, L. 1933, c. 381, § 4, p. 1070, suppl. to L. 1925, c. 65, p. 189.)

App. A:7-7. **Duration of act, operative effect of orders continued.**

This act shall take effect immediately, but shall become inoperative after September fifth, one thousand nine hundred and forty, but all orders or regulations made and all acts and things done under the provisions of this act shall be and remain valid and operative. (L. 1933, c. 48, § 5, p. 95, as am. by L. 1933, c. 166, § 5, p. 348, L. 1933, c. 258, § 5, p. 696, L. 1933, c. 381, § 5, p. 1071, L. 1936, c. 119, § 1, p. 300, L. 1937, c. 41, § 1, p. 87, L. 1938, c. 110, p. 231, § 1, L. 1939, c. 128, p. 437, § 1, suppl. to L. 1925, c. 65, p. 189.)

SUPREME COURT OF THE UNITED STATES.

No. 896.—October Term, 1941.

Faitoute Iron & Steel Company, The Howard Savings Institution, Florence W. Faitoute, et al., Appellants, *vs.* City of Asbury Park, A Municipal Corporation of the State of New Jersey.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[June 1, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

A New Jersey statute, adopted in 1931, authorized state control over insolvent municipalities. By a supplementary law, enacted in 1933, a plan for adjustment of the claims of creditors of such an insolvent municipality could be made binding upon all creditors. The question is whether an adjustment so authorized by a state impairs rights in violation of the Constitution of the United States.

The City of Asbury Park is a seashore resort with a resident population of 15,000. It presents a familiar picture of optimistic and extravagant municipal expansion caught in the destructive grip of general economic depression: elaborate beachfront improvements, costs in excess of estimates, deficits not annually met by taxation, declining real-estate values, inability to refinance a disproportionately heavy load of short-term obligations, and, inevitably, default. Accordingly, in January, 1935, availing themselves of the New Jersey Municipal Finance Act, creditors applied to the Supreme Court of New Jersey to place the state Municipal Finance Commission in control of the city's finances.

The legislation was enacted "to meet the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit", Laws of New Jersey (1931), c. 340, § 105. In broad terms, the legislation, through combined administrative and judicial action, adapted the underlying principles of an equity receivership to the solution of the problem of insolvent municipalities. By a supplementing act,

Laws of New Jersey (1933), c. 331, a "plan of adjustment or composition of the claims of all creditors" may be submitted on their behalf to the supreme court of the state. If approved by 85 per cent in amount of the creditors and by the municipality and the Commission, such plan of adjustment may be adopted "if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of a municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality." The plan cannot be authorized, however, if it involves any reduction of the principal amount of any outstanding obligation. Any creditor is entitled to appear and to be heard, but a plan which is so authorized by the court is binding upon all creditors whether or not they appear, and the substitution of new obligations for old in carrying out the plan is made effective from the day fixed by judicial order. To effectuate such a plan, the Act provides further that the court shall retain jurisdiction and "thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition."[1]

[1] The text of the legislation as incorporated in N. J. Revised Statutes (1937), tit. 52, c. 27, indicates the careful character of the legislation:

"52:27-34. Petition by creditors; plan of adjustment or composition; parties; notice. Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.

"The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.

"52:27-35. Allegations in petition. In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its

Pursuant to this legislative scheme, the City of Asbury Park was on March 7, 1935, placed under the control of the Municipal Finance Commission; on February 1, 1936, a plan for the refunding of its bonded debt was filed in the state supreme court, and that court took jurisdiction of the proceedings; the plan, as amended, was approved by the court on July 21, 1937; on September 28, 1937, it was duly approved by the Municipal Finance Commission; on April 29, 1938, it was consented to by creditors representing "85 per cent in amount of the indebtedness affected"

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public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

"52:27-36. Approval by supreme court justice of plan of adjustment or composition; findings. In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

"52:27-37. Approved plan binding on all creditors; substituted obligations. The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

"52:27-38. Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted. After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

"In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

"52:27-39. Reduction in principal of outstanding notes or bonds prohibited. Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality."

by the plan; and, on June 15, 1938, it was put into operation. The plan provided for the refunding of $10,750,000 of outstanding bonds; these were to be exchanged by the consenting creditors for new bonds to be issued in accordance with the terms of the plan approved by the court.

The appellants were holders of defaulted bonds and interest coupons issued by the City of Asbury Park in 1929 and 1930—prior, therefore, to the legislation which authorized the proceedings resulting in the challenged refunding scheme. The bonds of the appellants were part of the $10,750,000 of refunded bonds which, under the adjustment decreed by the court, could only be converted into new bonds maturing in 1966 and bearing a lower rate of interest than the original bonds. Deeming the arrangement authorized under the New Jersey statute to be violative of the Constitution of the United States, the appellants brought this suit for the face value of the old bonds and coupons. The Supreme Court of New Jersey dismissed the suit, 19 N. J. Misc. 322; the Court of Errors and Appeals affirmed the dismissal, 127 N. J. L. 239; and the case is here on appeal under § 237(a) of the Judicial Code, as amended, 28 U. S. C. § 344.

If the New Jersey legislation which is the foundation of the refunding plan for the City of Asbury Park is valid, appellants' claim on the old bonds was barred by law, and the judgment below must stand. The validity of that legislation is assailed on two grounds. It is contended, first, that the New Jersey laws constitute municipal bankruptcy legislation, that that field of lawmaking has been preempted by Congress, and that the New Jersey legislation is therefore inoperative. To this argument a few dates furnish a short answer. The present court proceedings began on February 1, 1936. The first federal Municipal Bankruptcy Act was declared unconstitutional on May 25, 1936. *Ashton* v. *Cameron County Dist.*, 298 U. S. 513. The refunding plan now assailed was approved, as we have seen, on July 21, 1937. It was thus authorized more than a year before the enactment of the only relevant federal statute, the Act of August 16, 1937, 50 Stat. 653, amending the Bankruptcy Act to provide for the composition of indebtedness of taxing agencies. Assuming Congress had power to do so, this Act did not profess to terminate a pending state court proceeding like that now in question. It would offend the most settled habits in the relationship between the States and the

nation to imply such a retroactive nullification of state authority over its subordinate organs of government.

We prefer, however, to dispose of this objection on a broader ground. Not until April 25, 1938, was the power of Congress to afford relief similar to that given by New Jersey for its municipalities clearly established, *United States* v. *Bekins*, 304 U. S. 27, and then only because Congress had been "especially solicitous to afford no ground" for the "objection" that an exercise of federal bankruptcy over political subdivisions of the State "might materially restrict its control over its fiscal affairs" whereby states would no longer be "free to manage their own affairs". The statute was "carefully drawn so as not to impinge on the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised . . . only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law." 304 U. S. at 50, 51. New Jersey expressly prohibits any municipality to avail itself of a federal bankruptcy act "unless the approval of the municipal finance commission . . . be first had and obtained". Revised Statutes of New Jersey (1937), 52:27-40. The City of Asbury Park has never attempted to resort to a federal bankruptcy court, and the New Jersey Municipal Finance Commission has not authorized it to do so. Can it be that a power that was not recognized until 1938, and when so recognized, was carefully circumscribed to reserve full freedom to the states, has now been completely absorbed by the federal government—that a state which, as in the case of New Jersey, has after long study devised elaborate machinery for the autonomous regulation of problems as peculiarly local as the fiscal management of its own household, is powerless in this field? We think not.

This brings us to the second and main contention, namely, that the appellants' claims in the form of the bonds and coupons issued by the City of Asbury Park, constituted contracts, the obligation of which is impaired by the denial of their right to recover thereon and by their transmutation, without their consent, into the securities authorized by the plan of adjustment.

The principal asset of a municipality is its taxing power and that, unlike an asset of a private corporation, can not be available for distribution. An unsecured municipal security is therefore merely a draft on the good faith of a municipality in exer-

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cising its taxing power. The notion that a city has unlimited taxing power is, of course, an illusion. A city cannot be taken over and operated for the benefit of its creditors, nor can its creditors take over the taxing power. Indeed, so far as the federal Constitution is concerned, the taxing power of a municipality is not even within its own control—it is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation. "A municipal corporation . . . is a representative not only of the State, but is a portion of its governmental power . . . . The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence." *United States* v. *Railroad Company*, 17 Wall. 322, 329. And see *Hunter* v. *Pittsburgh*, 207 U. S. 161.

In effect, therefore, the practical value of an unsecured claim against the city is inseparable from reliance upon the effectiveness of the city's taxing power. The only remedy for the enforcement of such a claim is a mandamus to compel the levying of authorized taxes. The experience of the two modern periods of municipal defaults, after the depressions of '73 and '93, shows that the right to enforce claims against the city through mandamus is the empty right to litigate. See Hillhouse, *Lessons from Previous Eras of Default* (chap. IV in Chatters, Municipal Debt Defaults); Report of the Securities and Exchange Commission on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1936), Pt. IV: Committees for the Holders of Municipal and Quasi-Municipal Obligations, *passim*; Dimock, *Legal Problems of Financially Embarrassed Municipalities*, contained in Summary of Proceedings, American Bar Assn., 1st Annual Meeting (1935), Section of Municipal Law, p. 12.

How, then, can claims against a financially embarrassed city be enforced? Experience shows that three conditions are essential if the municipality is to be kept going as a political community and, at the same time, the utmost for the benefit of the creditors is to be realized: impartial, outside control over the finances of the city; concerted action by all the creditors to avoid destructive action by individuals; and rateable distribution. In short, what is needed is a temporary scheme of public receiver-

ship over a subdivision of the state. A policy of every man for himself is destructive of the potential resources upon which rests the taxing power which in actual fact constitutes the security for unsecured obligations outstanding against a city.

To deny a state the means of giving substance to the taxing power which alone gives meaning to unsecured municipal obligations, is to hold in effect that the right to pursue a sterile litigation is an "obligation" protected by the Constitution of the United States. For there is no remedy when resort is had to "devices and contrivances" to nullify the taxing power which can be carried out only through authorized officials. See *Rees* v. *City of Watertown*, 19 Wall. 107, 124. And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (see Raymond, State and Municipal Bonds, 342-43), and evasion of service by tax collectors, thus making impotent a court's mandate. *Yost* v. *Dallas County*, 236 U. S. 50, 57. But if taxes can only be protected by the authority of the state and the state can withdraw that authority, the authority to levy a tax is imported into an obligation to pay an unsecured municipal claim, and there is also imported the power of the state to modify the means for exercising the taxing power effectively in order to discharge such obligation, in view of conditions not contemplated when the claims arose. Impairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it. The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired.

More than fifty years ago, Lord Bryce pointed out that the debt and taxation of American cities had reached "an alarming figure". Bryce, The American Commonwealth, p. 607. Beginning with 1915, the evil consequences of the unhealthy financial conditions of New Jersey municipalities began to occupy the attention of its legislature. Investigations by expert bodies led to a series of enactments tightening state control over municipal finances. See Reports of New Jersey Legislative Commission for the Survey of Municipal Financing, 1915, 1916, 1917; Reports of New Jersey Commission on Municipal Taxation and Finance, particularly Report No. 2 (Municipal and County Debt, 1931). The depres-

sion intensified the need for state control, and the establishment of the Municipal Finance Commission with the powers outlined above were designed, as stated by the legislature, to meet "the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit." But this emergency, as the decisions in this Court during the last ten years amply testify, did not evaporate. Students of the subject have pointed out that in the depression of 1893 as in that of 1873 "the worst financial difficulties for municipalities came in the fourth year of the depression". See Hillhouse, *supra,* at 14. History repeated itself, certainly as to New Jersey municipalities. See Report of New Jersey Municipal Finance Commission, 1937, and Second Annual Report of the Local Government Board (to which the functions of the Municipal Finance Commission were transferred in 1939), 1940, p. 11. The whole history of New Jersey legislation leaves no doubt that the state was bent on holding the municipalities to their obligations by utilizing the most widely approved means for making them effective. The intervention of the state in the fiscal affairs of its cities is plainly an exercise of its essential reserve power to protect the vital interests of its people by sustaining the public credit and maintaining local government. The payment of the creditors was the end to be obtained, but it could be maintained only by saving the resources of the municipality—the goose which lays its golden eggs, namely, the taxes which alone can meet the outstanding claims.

The real constitutional question is whether the Contract Clause of the Constitution bars the only proven way for assuring payment of unsecured municipal obligations. For, in the light of history, and more particularly on the basis of the recommendations of its expert advisers, the New Jersey legislature was entitled to find that in order to keep its insolvent municipalities going and at the same time fructify their languishing sources of revenue and thus avoid repudiation, fair and just arrangements by way of compositions, scrutinized and authorized by a court, might be necessary, and that to be efficacious such a composition must bind all, after 85 per cent of the creditors assent, in order to prevent unreasonable minority obstruction. As the court below pointed out, in view of the slump of the credit of the City of Asbury Park before the adoption of the plan now assailed, appellants'

bonds had little value; the new bonds issued under the plan, however, are not in default and there is a very substantial market for them. The refunding scheme, as part of an comprehensive plan for salvaging Asbury Park, both governmentally and financially, was so successful that the refunding bonds were selling at around 69 at the time of refunding, while at about the time the present suit was brought commanded a market at better than 90. See Second Annual Report of the New Jersey Local Government Board, 1940, p. 39.

From time to time, ever since *Sturges* v. *Crowinshield*, 4 Wheat. 122, 199, it has been stated that a state insolvency act is limited by the Contract Clause of the Constitution in authorizing composition of pre-existing debts. So it is, but it all depends on what is affected by such a composition and what state power it brings into play. The dictum from *Sturges* v. *Crowinshield* is one of those inaccurate generalizations that has gained momentum from uncritical repetition.

If a state retains police power with respect to building and loan associations, *Veix* v. *Sixth Ward Assn.*, 310 U. S. 32, 38, because of their relation to the financial wellbeing of the state, and if it may authorize the reorganization of an insolvent bank upon the approval of a state superintendent of banks and a court, but over the dissent of one-fourth of the depositors (except preferred or secured claimants), *Doty* v. *Love*, 295 U. S. 64, a state should certainly not be denied a like power for the maintenance of its political subdivisions and for the protection not only of their credit but of all the creditors by an adjustment assented to by at least 85 per cent of the creditors, approved by the commission of the state having oversight of its municipalities, and found wise and just after due hearing by a court.

The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." *Davis* v. *Mills*, 194 U. S. 451, 457. Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights, of what things are worth in dollars and cents, and in what is proposed to realize paper values. "The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact—of what the remedy amounted to in practice." *Pittsburgh Steel Co.* v. *Baltimore Eq. Soc.*, 226 U. S. 455, 459.

This was said of the claim of a creditor of a private corporation. How much more pertinent is it to claims of these appellants against the municipality of Asbury Park in the circumstances before us.[2] To say that the right of the Asbury Park bondholders in 1935 was a precarious character is pure understatement. And we have already seen how empty was the remedy with which to enforce that right.

"In the books there is much talk about distinctions between the substance of the contract and changes of the remedy . . . . The dividing line . . . at times obscure." *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60. The dividing line will remain obscure if we deal with empty abstract rights instead of worldly gains and losses, if we indulge in doctrinaire talk about "rights" and "remedies", instead of giving these concepts a content that carries meaning to the understanding of men. Here we have no such action as that disclosed in *Worthen Co.* v. *Kavanaugh*, *supra*, where with "studied indifference to the interest of the mortagee or to his appropriate protection", legislation was found "to have taken from the mortgage the quality of an acceptable investment for a rational investor," and the challenged changes of remedy were found to be "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security". Here we have just the opposite—no security whatever except the effective taxing power of the municipality; the effective taxing power of the municipality prostrate without state intervention to revive the famished finances of the city; state intervention, carefully devised, worked out with scrupulous detail and with due regard to the interests of all the creditors.

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[2] Compare Chicago &c. Railroad *v.* Nebraska, 170 U. S. 57, 72. "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

and scrutinized to that end by the state judiciary with the result that that which was a most depreciated claim of little value has, by the very scheme complained of, been saved and transmuted into substantial value. To call a law so beneficent in its consequences on behalf of the creditor who, having had so much restored to him, now insists on standing on the paper rights that were merely paper before this resuscitating scheme, an impairment of the obligation of contract is indeed to make of the Constitution a code of lifeless forms instead of an enduring framework of government for a dynamic society.

We do not go beyond the case before us. Different considerations may come into play in different situations. Thus we are not here concerned with legislative changes touching secured claims. The New Jersey courts have held that under this very statute tax anticipations and revenue notes stand on an entirely different footing from other municipal obligations and in relation to them no claim is affected by the Municipal Finance Commission Act of 1931. *State* v. *Fort Lee*, 14 N. J. Misc. 895. The differentiation thus made by New Jersey regarding various obligations in itself indicates the detailed care with which the legislation of the State proceeded in readjusting outstanding municipal obligations.

Affirmed.

Mr. Justice REED concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.